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THE PROPOSED REVISION OF THE NEW YORK LAW OF CIVIL PROCEDURE

Samuel M. Hesson *

INTRODUCTION

The objectives of reform in procedural law are commonly stated to be simplification, rearrangement, and consolidation of statutes and rules regulating procedure. Frequently the revisers are directed to transfer provisions not related to procedure to their proper place in the consolidated laws. A somewhat broader mandate was given to the commissioners who reported the David Dudley Field Code of Procedure. They were directed by the legislature "to revise, reform, simplify and abridge the rules and practice, forms and proceedings of courts of record."[1] The Field Code was not intended to be a comprehensive code of procedure. Originally it contained less than four hundred sections which dealt with the main steps in an action from institution of the suit to enforcement of the judgment. The Code of Civil Procedure of 1876 and 1880, known as the Throop Code, was a greatly expanded document. It contained over three thousand sections and constituted a collection of all statutes relating to the courts and practices therein. There were criticisms of the Throop Code because of its prolixity, its poor arrangement, and the presence of many matters unrelated to procedural law.

In 1915 a short practice act was recommended by the Board of Statutory Consolidation to the legislature. It was thought that the act should set forth in brief form the fundamental principles and that the details of practice should be left to rules adopted by the courts. The recommendation was not adopted by the legislature.[2]

Prior thereto a number of bar associations adopted resolutions approving the plan of the Code and statutory revision adopted by the joint committee of the legislature under the chairmanship of A. J. Rodenbeck. The identical wording of the resolutions suggests that they emanated from a common source. The objectives of the plan were stated as follows:

> First: *As to the Code of Civil Procedure.*
>
> 1. Eliminate from the present code all provisions not relating directly to practice, assigning the material so removed to a place in the General Laws.
>
> 2. Make such obviously necessary changes in pleading and practice as may be agreed upon by the authority making the revision after conference with the bench and the bar.
>
> 3. Reduce the general practice provisions to a single brief legislative practice act.[3]

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[1] 1 CARMODY, NEW YORK PRACTICE 91 (2d ed. 1930).

[2] *Id.* at 93.

[3] The resolutions are collected in an unpublished manuscript.

The last general revision of the law of civil procedure took place with the enactment of the Civil Practice Acts, passed in 1920, effective in 1921. The law was supplemented by the Rules of Civil Practice.[4] The bulk of the law was still in a procedural statute of about fifteen hundred sections. Regulation of procedure by rule had not yet been committed to the courts. If brevity was an objective, it can scarcely be said to have been achieved; if simplification was sought, it can be argued that it was not found. The Civil Practice Acts, however, were an improvement. Many substantive provisions were transferred to the consolidated laws, and there was reform in the adoption of a declaratory judgment statute,[5] a summary judgment rule,[6] a liberal rule for joinder of parties in litigation,[7] and other innovations.

Many reforms were made in the Civil Practice Acts after their enactment: a liberalization of the rules in respect of joinder of causes of action; [8] an improved counterclaim procedure; [9] the enactment of article 78 of the Civil Practice Act; the relaxation to some extent of the stringent rules which interfered with the discovery process; [10] the codification of rules governing motions for directed verdict; [11] and many other improvements. Many of these reforms were brought about upon recommendation of the Judicial Council.

In 1955 the Advisory Committee on Practice and Procedure was appointed and commenced its work under the aegis of the Temporary Commission on the Courts. The committee's work was completed under the sponsorship of the Finance Committee of the New York Senate and the Ways and Means Committee of the Assembly. The task assigned to the committee was to make a complete revision of New York practice. The product of that task which endured for five years is embraced in four annual reports to the legislature, the last of which was submitted in 1960. Bills which would effectuate the proposed revision were pre-filed in the legislature in November, 1959. They were introduced for study only, since it was thought that they should be considered by bench and bar before being offered for passage.

The Advisory Committee on Practice and Procedure has not been alone in its attention to this comprehensive work. The Joint Committee on the Civil Practice Act representing the New York State Bar Association, the Association of the Bar of New York City and the New York Lawyers' Association, known as the William E. Jackson Committee, has reviewed every section of the work and made numerous criticisms and proposals. At the request of the Honorable Charles S. Desmond, Senator Hughes and Assemblyman Volker, numerous bar associations have undertaken the task of reviewing and reporting upon portions of the proposed revision. Thus far this year five public hearings have been held upon the proposals.

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[4] The rules were adopted by a convention of bench and bar held at Albany, N.Y. in 1920 pursuant to ch. 902 of the Laws of 1920.

[5] N.Y. Civ. Prac. Act § 473.

[6] N.Y. R. Civ. Prac. 113, 114.

[7] N.Y. Civ. Prac. Act §§ 209, 212.

[8] N.Y. Civ. Prac. Act § 258.

[9] N.Y. Civ. Prac. Act §§ 262, 266.

[10] See N.Y. R. Civ. Prac. 121-a.

[11] N.Y. Civ. Prac. Act § 457-a.

The work of revision has not been merely a task of simplification, rearrangement and transfer. There have been other worthwhile objectives in mind. A movement for procedural reform should take cognizance of the fact that procedural law is not an end in itself; that it exists to serve the ends of justice. Proved devices which enable courts the better to ascertain truth, which enable courts to function more efficiently and inexpensively, which reduce the mechanical paper work in a lawyer's office, or which dispense with unnecessary applications to a court or judge, should be incorporated in any up-to-date revision. There should be an effort, too, to eliminate as much as possible conceptions in respect of the effect of failure to follow statute or rule with minute correctness as rendering proceedings irretrievably lost. Such failure in the vast majority of cases is mere correctible irregularity and should not be considered jurisdictional where it does not operate against right and justice. Statutes have long since so provided in general terms, but the jurisdictional defect in many respects still remains with us. Brevity, too, is an important objective, but brevity is a relative term. A code of procedure should endeavor to make a nice accommodation between that prolixity which makes for cumbersomeness, and that conciseness which necessitates a large body of decisional law to make precise that which could be made apparent by a few sentences in statute or rule.

The bills now in the legislature would repeal the Civil Practice Act and the Rules of Civil Practice. In their place would be enacted a Civil Practice Law and the Rules of Civil Procedure. The former, dealing with matters of substantial importance to the rights of persons in litigation, would be a relatively short document, and would be subject exclusively to legislative control. The latter would regulate the details of practice in the courts and, when once enacted by the legislature, would be subject to a rule-making power which would be vested in the Judicial Conference. An express provision reserves a legislative power of recall over amendments and additions to the rules made under the rule-making authority.

Three of the bills amend the consolidated and unconsolidated laws. There are many transfers proposed to be made from the Civil Practice Act. The transfers which will probably seem most important to the profession are the proposed transfer of the sections governing real property actions to the Real Property Law, and those governing the matrimonial actions to the Domestic Relations Law. There are many other proposed transfers, *e.g.*, the law in respect of incompetency proceedings would be transferred to the Mental Hygiene Law, and section 876-a of the Civil Practice Act, limiting the granting of injunctions in labor disputes, to the Labor Law.

The proposed revision effects transfers of substantive matters to the consolidated laws; it repeals statutes which have long since ceased to have any meaning; it adopts procedural reforms which are in the interest of litigants and the public alike; and it recasts the law in different language. But it should be emphasized that the proposed revision is not a revolution. The basic forms of civil procedure remain unchanged. A brief account of the more important changes will indicate clearly that lawyers will continue to conduct litigation in much the same manner as they conducted it before.

LIMITATION OF ACTIONS

The tendency in New York, since the third decade of this century, has been to shorten the periods of time within which actions may be commenced. There has been a legislative opinion that one who has a cause of action should not unjustifiably sleep upon his rights; that such inaction often works a hardship upon the person against whom the cause of action is claimed to exist. The statutes of limitation are, therefore, proposed to some extent to be shortened further still. The general statute of limitations, applicable to causes as to which no period of time is expressly prescribed, is proposed to be reduced from ten years to five,[12] and the actions now governed by the six-year statute of section 48 of the Civil Practice Act would be governed by a five-year statute instead.[13] Actions for injury to person or property would continue to be subject to a three-year statute of limitations, except that causes of action based on malicious torts would be governed by a one-year statute as actions for libel and slander are now.[14] The statute extending the time for commencement of an action where the plaintiff is subject to disabilities has been changed to reduce the period of extension, where the time limited is at least three years, to three years after the cessation of the disability.[15] If the period limited is less that three years, the time is extended by the period of disability.[16] Extension of time by reason of absence from the state remains as it now is except that absence creates no extension if the action is in rem or could be prosecuted by attachment.[17] The theory as to the effect of war upon the running of the period of limitations remains unchanged.[18]

JURISDICTION OF COURTS

There is no general statute in New York authorizing the courts to exercise personal jurisdiction over persons not domiciled in the state by reason of acts performed within the state. The legislature has dealt with the matter piece-meal. The legislative technique has been to deal with each situation separately, authorizing the assumption of personal jurisdiction over non-domiciliaries where a cause of action has arisen by reason of specified conduct of the non-domiciliary within the state, and prescribing the mode of serving process. Article 3 of the proposed Civil Practice Law is a general statute which, in addition to providing that a court may exercise jurisdiction over persons, property, or status in the manner heretofore exercised, or as otherwise authorized by law, would authorize the exercise of personal jurisdiction over any person who (1) transacts any business within the state; or (2) commits a tortious act within the state resulting in physical injury to person or property; or (3) owns, uses or possesses any real property within the state.[19] Similar statutes exist in Illinois, Maryland and Vermont.[20] They are designed, as the New York proposed statute is, to take advantage of the constitutional power of a state to exercise jurisdiction in personam over non-domiciliaries who have committed acts within the state. There are decisions upholding the constitutionality of such statutes.[21]

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[12] Proposed New York Civil Practice Law § 5.13 [hereinafter cited as CPL].

[13] *Ibid.*

[14] CPL §§ 5.14, 5.15.

[15] CPL § 5.8.

[16] *Ibid.*

[17] CPL § 5.7.

[18] CPL § 5.9.

As now provided a general appearance confers personal jurisdiction over the defendant. The special appearance for the purpose of contesting jurisdiction would be abolished.[22] A defendant may raise an objection to the court's jurisdiction over his person either by motion before answer or by the answer itself.[23] If the court's jurisdiction is in rem only or quasi in rem, an appearance is not the equivalent of personal service if an objection to jurisdiction is properly raised, but if the defendant proceeds with the defense of the action in rem, his appearance confers personal jurisdiction.[24]

VENUE

Venue provisions are considered to have such a substantial relation to the rights of parties in litigation that they are contained in the Civil Practice Law.[25] The changes proposed are important but not substantial in number. There is an express provision, which merely states existing law, that venue requirements relate to place of trial and do not affect the jurisdiction of the court.[26] A written agreement fixing venue is enforceable on a motion for change of place of trial.[27] In most instances proper venue is determined, as in present practice, by the residence of the parties. Corporations organized under the laws of this state and foreign corporations authorized to do business in this state would be deemed to be residents of the county in which their principal office is located.[28] Unincorporated associations, partnerships and individually owned businesses are deemed residents of any county in which an officer, partner or individual owner resides or in which the enterprise has its principal office.[29] The statute regulating venue in actions on assigned claims is simplified; for venue purposes the residence of the assignee is deemed to be the residence of the assignor at the time of the assignment.[30] The grounds for motion for change of venue remain unchanged, but the present requirement of a demand for change of venue, where venue is improperly laid, as a condition precedent to a motion for change of venue, is to be eliminated.[31]

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[19] CPL § 3.1.

[20] ILL. CIV. PRAC. ACT § 17; VT. REV. STAT. § 1562; MD. ANN. CODE, art. 23, § 88(d).

[21] Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951); Compania de Astral, S. A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955); see International Shoe Co. v. Washington, 326 U.S. 310 (1945) and McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[22] Proposed New York Rules of Civil Procedure 31.01 [hereinafter cited as RCP].

[23] RCP 28.1.

[24] RCP 28.1.

[25] CPL art. 4.

[26] CPL § 4.1.

[27] CPL § 4.2.

[28] CPL § 4.4(c).

PARTIES

There has been no substantial change in the law which permits multipartite litigation. The rules as to joinder of parties, both plaintiff and defendant, impleader, interpleader and intervention of parties are not modified to any extent. The subject of parties has had the close attention of the Judicial Council and change is thought to be unnecessary. The "real party in interest" statute is proposed to be abolished. Its elimination will effect no change in existing law, but will eliminate an invitation to the misconception that "the real party in interest" is the party "beneficially" interested in the recovery.

SERVICE OF PROCESS

The proposed Rule 25.1(b) adopts the view that defects in the form of the summons are mere irregularities which are correctible, and that unsubstantial procedural defects may be disregarded.[32] Rule 25.2 regulates personal service within the state and specifies the persons upon whom personal service may be made. It eliminates troublesome distinctions in the present law in relation to the persons who may be served with the summons in an action against a domestic corporation on the one hand and a foreign corporation on the other. In either case the summons could be delivered to an officer, director or managing or general agent, or to a person authorized by appointment or by law to receive service.[33]

Personal service upon an adult natural person would be made by delivering the summons to the person served or to "a person of suitable age and discretion at the place of business, dwelling house or usual place of abode of the person to be served;" or to a designated service agent.[34] Substituted service under Civil Practice Act, sections 230–231, would be abolished. There is ample precedent in other jurisdictions for permitting service of process upon a defendant by delivering it to a person of suitable age and discretion at the defendant's residence. An order for such service would not seem to increase the probabilities that the process would reach the defendant. Since Rule 25.6 provides for opening up a judgment within five years if the summons is served otherwise than personally, it is expected that personal delivery of the summons to the defendant will continue to be the preferred mode of service.

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[29] CPL § 4.4(d).

[30] CPL § 4.4(e).

[31] CPL § 4.10(b).

[32] See Valz v. Sheepshead Bay Bungalow Corp., 249 N.Y. 122, 163 N.E. 124 (1928).

[33] RCP 25.2(f).

[34] RCP 25.2(b). A subsequent change in the proposal would preserve affixation to the door plus mailing as a method of making service if service cannot otherwise be made. Mailing would also be required where delivery of the summons is made to a person other than the defendant.

Service of the summons outside the state in actions in rem or quasi in rem, in matrimonial actions, and in actions in personam in which our courts may constitutionally exercise jurisdiction over the defendant, is permissible.[35] Service may be made without the state by an authorized person in the same way as service is made within the state.[36] Service by publication is allowed only if service by another prescribed mode cannot be made with due diligence.[37] If an order for publication is made, the first publication must be made within twenty days after the order is granted. The number of publications is reduced from six to four and publication is required in only one paper rather than in two. Service is complete on the twenty-eighth day after the first publication.[38]

An original proposal that, except in matrimonial actions, the complaint be required to be served with the summons has been abandoned.[39]

PLEADING

New York rules of pleading have long been criticized in various quarters. It has been thought that the requirement that "ultimate" facts be pleaded is not capable of being satisfied according to any logical standard. It has been urged, too, that the enforcement of the rule interferes with the expeditious adjudication of cases on the merits, that pleadings which do not satisfy the requirement are dismissed only to be amended, and that meticulous compliance with the rule is unnecessary if the defendant is given reasonable notice of the plaintiff's claim.

The proposed revision avoids the present requirement that a complaint shall contain "a plain and concise statement of the material facts" and provides that a pleading shall "consist of plain and concise statements" which shall be "sufficiently particular to give the court and the parties fair notice of the transactions or occurrences intended to be proved and the nature of each cause of action or defense."[40] There are two proposed rules which specify the particularity with which specific matters and certain actions must be pleaded.[41] There is an appendix of pleading forms.

Pleadings are not required to be verified under the proposed rules if a party appears by attorney. Instead the pleading is required to be signed by the attorney of record. The attorney's signature constitutes a certification by him that he has read the pleading, that to the best of his knowledge and belief there is good ground to support it, and that it is not interposed for harassment or delay. A wilful violation would subject the attorney to disciplinary action.[42]

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[35] RCP 25.3.

[36] RCP 25.4.

[37] RCP 25.5.

[38] RCP 25.5.

[39] See RCP 26.2.

[40] RCP 26.4.

[41] RCP 26.5 and 26.6.

Existing rules governing consolidation, severance, the trial of two actions together, separate trials of issues or causes of action, and the removal of an action from one court to another remain substantially unchanged.

PRACTICE BEFORE TRIAL

A number of changes in the law governing proceedings between the pleading and trial stages of litigation are proposed. They relate to motion practice, the bill of particulars, judgment without a trial, the discovery process, pre-trial conferences, and subpoenas. An effort has been made to simplify motion practice. The distinction between motions made in court and those made in chambers, and the distinction between the forms of court orders and judge's orders is proposed to be abolished.[43] All motions could be made before a judge in court, or before a judge in chambers, and the orders wherever obtained are to be in the same form and are required to be entered.[44] The mode of service is to be the same whether the order is a court or a judge's order. An attorney would be allowed to certify a paper furnished by him with the same effect as if it were certified by a clerk.[45]

Motions to correct pleadings.—The permissible corrective motions, under the proposed rules are the motion for a more definite statement where a pleading is so vague that a party cannot reasonably be required to answer, and the motion to strike out "scandalous or prejudicial matter." [46]

Motions to dismiss.—It was originally proposed that the motion to dismiss for failure to state facts sufficient to constitute a cause of action be abolished. The reason for the proposal was that the granting of such motions seldom terminated the litigation on the merits since amendments were freely allowed. Since the granting of the motion does in some cases result in a final adjudication without a trial, it is now proposed that the motion be retained, but that on the motion, the pleader shall state whether he desires leave to amend if the motion is granted, and shall state the facts upon which he will rely to state a cause of action in the amended pleading.[47]

Accelerated judgment.—The term "accelerated judgment" is new in New York practice. It is adopted to describe a number of devices by which a party may obtain judgment in advance of trial.

The motion for judgment authorized by Rules of Civil Practice 106 through 111 and the motion for judgment on the pleadings authorized by Rule of Civil Practice 112 are supplanted by a single motion for judgment on grounds specified in the present rules and a few additional grounds involving defenses which often can be proved with certainty.[48] The facts upon which the motion is made may be proved by affidavit if the defect or defense does not appear upon the face of the pleading.[49] The motion is intended to be made before answering, and objections not so raised, and not raised by answer, are deemed waived if in the nature of things they are waivable.[50] Upon the motion the court may treat the application as a motion for summary judgment.[51]

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[42] RCP 26.11.

[43] RCP 33.2.

[44] RCP 33.10, 33.11(a).

[45] RCP 33.11(b).

[46] RCP 26.12.

[47] RCP 31.1.

[48] RCP 31.1(a).

The summary judgment rule as it now exists is retained. An innovation would permit an action on a judgment or an instrument for the payment of money only to be commenced by service of a summons and a notice of motion for summary judgment with supporting affidavits. No pleading would be required.[52]

The procedure upon confession of judgment has not been altered, and the provisions in respect of default judgments remain substantially the same.

Bills of particulars.—The bill of particulars, abolished in federal practice, is proposed to be abolished in New York. It is felt that its function is better served by the discovery process.

Discovery.—Discovery in New York has been limited by restrictive rules.[53] The Judicial Council recommended revision of the rules from the time that the Federal Rules of Civil Procedure were adopted. It was not until Rule of Civil Practice 121-a was adopted in 1952, however, that examination before trial of parties to litigation was freely allowed. The rule still exists, however, that witnesses can be examined before trial only under special circumstances.[54] It is proposed that the distinction be eliminated. The proposed rule would provide that "there shall be full disclosure before trial of all relevant evidence and all information reasonably calculated to lead to relevant evidence." [55] Limitations are expressly provided making it unnecessary to disclose the work product of an attorney, the opinion of an expert, any writing or other thing created in preparation for litigation, or matter which is privileged.[56]

Discovery may be had by any of the procedures available today, depositions, physical examinations, inspection of books, papers, documents and articles of property, requests for admissions, and by one additional device, written interrogatories. The procedure is by notice in most cases; it is only in the unusual case that an order is required.[57] The rules expressly confer on the court the authority to make necessary orders to protect a person from vexation or harassment.[58]

Pre-trial conference.—In every contested case, except matrimonial actions and special proceedings, the proposed rules would require a pre-trial conference, subject to the power of the appellate division of the supreme court to adopt pre-trial rules for all or part of its department.[59] It is intended that the conference shall be of the type adopted in New Jersey, *i.e.*, a conference to obtain as much information about the case as possible for the purpose of simplifying the issues and expediting the trial.[60]

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[49] RCP 31.1(b).

[50] RCP 31.1(d).

[51] RCP 31.1(b).

[52] RCP 31.3.

[53] See Weinstein and Bergman, *New York Procedures to Obtain Information in Civil Litigation*, 32 N.Y.U.L. REV. 1066 (1957).

[54] N.Y. CIV. PRAC. ACT § 288.

[55] RCP 34.1.

[56] RCP 34.1(b) and (c).

[57] RCP 34.2(b) and (c).

[58] RCP 34.3.

Subpoenas.—A rule is proposed which will make practice in respect of subpoenas as uniform as possible. They would be issuable by a clerk, a judge if there is no clerk, an attorney, a person authorized to receive evidence, or a person designated by a board or body authorized to receive evidence.[61] In a few cases a court order is required.[62] Provisions of a special nature are retained as to hospital records and certain public records. The subpoena is served in the same manner as a summons. The penalty for disobedience of a judicial subpoena has not been changed. The court may enforce compliance with a nonjudicial subpoena.[63]

THE TRIAL

Trial practice.—There are very few changes proposed in respect of trial practice. The mode of trial, whether by jury, the court alone or by a referee would be substantially as now provided except that equitable defenses would be triable by the court alone.[64] The existing rule in respect of mode of trial of counterclaims is retained by an express provision that equitable counterclaims are triable by the court alone and a provision that a party does not waive his right to jury trial of a legal counterclaim by interposing it in an action not triable by jury.[65] A plaintiff would not waive his right to jury trial of the issues in a legal action by joining it with a cause of action not triable by jury provided the claims are based upon separate transactions.[66]

Where a party is entitled to jury trial of all or some of the issues of fact, he may obtain such trial by serving and filing a note of issue containing a demand for jury trial or specifying the issues which he desires to have tried by jury.[67] A party served with a note of issue not containing such demand, or specifying some but not all of the issues as triable by jury may himself serve a demand for jury trial of all issues or specifying additional issues which he desires tried by jury.[68] If no demand is made, the right to jury trial is waived. It is expressly provided, however, that the appellate division may provide for its department, or part thereof, a rule that a party shall be deemed to have demanded trial by jury by filing a note of issue which does not contain an express waiver.[69]

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[59] RCP 35.1 and 35.2(d).

[60] RCP 35.5.

[61] RCP 38.2.

[62] RCP 38.2(b).

[63] RCP 38.6.

[64] RCP 41.1.

[65] RCP 41.1 and 41.2(c).

[66] RCP 41.2(c).

[67] RCP 41.2.

[68] RCP 41.2(a) and (b).

[69] RCP 41.2(d).

The procedure now required of applying to the court for an order framing issues for submission to the jury in a case in which the right to jury trial is not guaranteed by the constitution would be supplanted by the uniform procedure set forth above.

It has been found during the course of the trial in some cases that a plaintiff demanding equitable relief was entitled to legal relief if he was entitled to recover at all, and that the adverse party was, therefore, entitled to a jury trial. The court has determined that in such case the complaint must be dismissed.[70] A new proposed rule would require the court, instead, to accord the adverse party an opportunity to demand a jury trial, and to order a jury trial if demand therefor was made.[71]

The optional use of a six-man instead of a twelve-man jury is authorized by the proposed rules.[72] If the party first noticing the case for trial specified that he demanded trial by a jury of six, the adverse party could still demand trial by a jury of twelve if he so desired.

There is an express provision allowing the judge in his discretion to conduct the examination of the jurors.[73] Parties may state to the judge matters upon which *voir dire* inquiry is desired, and the judge may inquire into such matters or may permit the party to do so.[74] The existing law as to challenges to jurors remains unchanged except that a peremptory challenge is given for each alternate juror instead of one such challenge for two alternate jurors.[75]

The presently existing rules governing devices for delineating the boundaries of the authority of judge and jury, the motions for nonsuit, for directed verdict, and for judgment notwithstanding the verdict are retained. The types of verdicts and the rules governing the court's control of the jury in its deliberation remain as they now are. There is express provision for a motion to be made after the trial which will present the question whether one party or the other is entitled to judgment as a matter of law, or whether a new trial should be granted.[76] Motions for new trial would be made before the trial judge, not at special term, and motions for new trial made in the first instance in the appellate court would no longer be authorized.

Evidence.—The proposed revision does not embrace a comprehensive consideration of the law of evidence. Since the law of evidence affects proceedings in criminal as well as civil courts, it was thought that evidence should be made the subject of a separate study. It is proposed, however, that the "dead man's statute," which makes a person interested in the event incompetent to testify to a personal transaction with a person deceased, should be abolished.[77] Not only would such person be competent to testify to such transaction, but the hearsay declarations of the deceased person would be made admissible. There is a wide divergence of opinion among interested individuals and groups as to the wisdom of abolishing the existing statute.

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[70] Jackson v. Strong, 222 N.Y. 149, 118 N.E. 512 (1917).

[71] RCP 41.3. This is in accord with a recommendation of the Judicial Council. See 20 N.Y. Jud. Council Rep. 298 (1954).

[72] RCP 41.4.

[73] RCP 41.7. Such examination by the judge is presently authorized by Federal Rule of Civil Procedure 47(a).

[74] RCP 41.7.

[75] RCP 41.9.

[76] RCP 45.4.

A new rule would require the court to take judicial notice of the common law, constitutions and public statutes of every state, territory and jurisdiction of the United States.[78] Under present statutory rule the court is permitted but not required to do so.[79] The lawyer must, therefore, be prepared in court to prove such foreign law. A requirement that judicial notice be taken will in many cases obviate the necessity. As to foreign law other than that mentioned above, a party may request that judicial notice be taken. The party making the request must have given each adverse party notice of his intention to make it and must furnish the court sufficient information to enable it to comply with the request.[80]

A new rule provides that questions calling for the opinion of a witness need not be in hypothetical form unless the court orders otherwise.[81] In such case the data upon which the opinion is based may be brought out upon cross-examination.

JUDGMENTS AND ENFORCEMENT

Judgments.—Title 50 of the proposed rules represents a simplification, rearrangement and consolidation of rules defining judgments, stating their effect and the grounds upon which a party may have relief therefrom, and providing for their entry, docketing and satisfaction. A judgment is entered when it is filed by the clerk.[82] The judgment roll is required to be filed when the judgment is entered, and it then becomes the duty of the clerk to docket the judgment if it is a money judgment or one affecting title to real property.[83] The judgment of a court other than the supreme or county court may be docketed upon the filing of a transcript thereof.[84] A judgment docketed in the office of the clerk of the county in which it was entered may be docketed upon a transcript in the office of any other county clerk.[85] A principal object of the revision was to provide a central place, the county of entry of the judgment, where a person could obtain information as to the status of a judgment, the counties in which the judgment was docketed, and information as to the issuance and return of executions.

Enforcement.—Title 60 of the proposed rules regulates enforcement of judgments generally, and title 61 the enforcement of money judgments. Judgments awarding possession of real property or a chattel would continue to be enforced by execution.[86] Judgments directing the sale of real property would be carried out by the customary judicial sale.[87] Contempt proceedings would be available to enforce judgments not enforceable by execution.[88] There are some proposed innovations in the law respecting enforcement of money judgments. Under present law money judgments are enforced by execution or pursuant to the statutory aid of supplementary proceedings. The proposed title 61 of the Rules integrates the rules in respect of enforcement proceedings. It states where such enforcement proceedings may be instituted. It authorizes the service upon the debtor or a third party of a restraining notice prohibiting the transfer of property belonging to the debtor,[89] and provides for an examination of the debtor or third party in respect of the property of the debtor in his possession.[90] Installment payment orders are authorized,[91] a device which is today limited to supplementary proceedings. The form of an execution is prescribed as well as the mode of levy upon, and sale of, real and personal property.[92] The complicated "auction among creditors" today provided in the case of execution sales of real property is abolished, as is the redemption period allowed by existing law. The garnishee execution would be modified in important respects. It would no longer be necessary to have a property execution returned unsatisfied, nor would an order of the court be required for the issuance of the "income execution." Furthermore, the execution would be served on the debtor, and not upon the employer, unless the debtor defaulted in his payments.[93] A study has shown that a high percentage of employers in the state discharge an employee against whom a garnishee execution is issued.

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[77] See RCP 44.10.

[78] RCP 44.1.

[79] N.Y. CIV. PRAC. ACT § 344-a.

[80] RCP 44.1.

[81] RCP 44.6.

[82] RCP 50.6.

[83] RCP 50.7 and 50.8.

[84] RCP 50.8.

[85] RCP 50.8.

The execution against the person is proposed to be abolished.

PROVISIONAL REMEDIES

Civil arrest.—A half century ago Charles Evans Hughes proposed that arrest in civil actions at law should be abolished. The Judicial Council made a similar recommendation which was later withdrawn. The Committee on Law Reform of the Association of the Bar of the City of New York has more recently advocated that the remedy be abolished. The Advisory Committee on Practice and Procedure proposes the abolition of civil arrest as now authorized in certain legal actions by section 826 of the Civil Practice Act. It is proposed, however, to retain civil arrest in the situation in which it is now authorized by section 827 of the Civil Practice Act, *i.e.*, in an action to procure a judgment requiring the defendant to perform an act the refusal to perform which would constitute a contempt of court.

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[86] RCP 60.2.

[87] RCP 60.3.

[88] RCP 60.4. Either contempt proceedings or the proceeding to enforce a money judgment may be resorted to if the judgment requires payment into court or to a court officer, or requires a fiduciary to pay money for a dereliction of his duty. RCP 60.5.

[89] RCP 61.1.

[90] RCP 61.3.

[91] RCP 61.5.

[92] RCP 61.9, 61.10, 61.11, 61.12, 61.13.

[93] See RCP 61.5.

Attachment.—A modification of existing law would permit attachment not only in actions at law for a sum of money, but also in equitable actions in which the relief sought was, in whole or in part, pecuniary.[94] An original proposal that attachment should not be permitted in the fraud situations specified in subdivisions 4, 5 and 6 of section 903 of the Civil Practice Act has now been abandoned.

Injunctions and receivership.—No changes of substance are proposed in respect of the provisional remedies of injunction and receivership.

Lis pendens.—The lis pendens provisions are contained in the provisional remedy section of the statute since the filing of the notice has the effect of giving provisional relief.[95] A notice of pendency of an action in federal court may be filed in a county clerk's office under circumstances which would authorize the filing if the action had been commenced in a state court.[96]

SPECIAL PROCEEDINGS

There are hundreds of special proceedings authorized by the Civil Practice Acts and the consolidated and unconsolidated laws. The statutes authorizing them usually prescribe the procedure to be followed. There is, however, no uniformity in the procedural provisions, and there is often difficulty in determining whether individual provisions contained in the Civil Practice Act are applicable to special proceedings as well as to actions. It is, therefore, proposed that the Rules of Civil Procedure contain a title prescribing a uniform procedure for special proceedings.[97] The proposed rules are modeled upon the procedural provisions governing a proceeding against a body or officer under article 78 of the Civil Practice Act. The proceeding is instituted by notice of petition served in the same manner as a summons, or by order to show cause. The notice must be served at least eight days before the return day, the answer at least one day before. If ten days notice of petition is given, the answer can be required to be served five days before the return day. The pleadings are the petition, an answer and any other pleading authorized in an action. On the return day there is a hearing, and issues of fact are tried before court, or court and jury as may be appropriate. One of the former distinctions between actions and special proceedings, was that the latter terminated in an order, not a judgment. The effect of order or judgment was the same, however, and it is now proposed that the final determination of a special proceeding shall be embraced in a "judgment." [98]

Habeas corpus.—Habeas corpus is a special proceeding but it is separately governed in article 7 of the proposed revision. The subject is not of such a nature as to be regulated under the rule-making power. The provisions are substantially a recodification of the procedural rules governing habeas corpus at the present time.

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[94] CPL § 15.3.

[95] CPL § 15.8.

[96] CPL § 15.8.

[97] RCP title 27.

[98] RCP 27.9.

Proceedings against a body or officer.—The article 78 proceeding is of such a nature that it is provided for separately in title 111 of the Rules of Civil Procedure. The advisory committee has merely attempted to simplify and clarify the present provisions governing this statutory substitute for the great prerogative writs of mandamus, certiorari and prohibition.

Proceeding relating to express trust.—This special proceeding was recommended by the Judicial Council in 1943.[99] The only objection which seems to have been voiced as to its operation related to the reluctance of the supreme court to take jurisdiction where there is a series of related trusts as to which the surrogate's court also has jurisdiction. The proceeding is separately regulated in title 113 of the Rules of Civil Procedure.

Arbitration.—The arbitration law is found in article 17 of the proposed Civil Practice Law. It is substantially the same as the present law. The changes made are in the main to simplify and clarify the existing provisions governing the arbitration proceeding. The basic section provides that a written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable "without regard to the justiciable character of the controversy." [100]

PARTICULAR ACTIONS

Real property actions and matrimonial actions.—It is proposed that the present provisions of the Civil Practice Act governing the real property actions and matrimonial actions be transferred respectively to the Real Property Law and the Domestic Relations Law. While these provisions are mainly procedural in nature, there is precedent for their inclusion in the consolidated laws in the circumstance that many other procedural provisions applicable to particular actions are therein found.

Action to recover a chattel.—This action is separately governed in title 114 of the Rules of Civil Procedure which constitutes a much needed simplification of the existing statutes.

APPEALS

To the Court of Appeals.—Since constitutional amendments would be necessary, no substantial changes have been attempted in respect of the jurisdiction and powers of the court of appeals. The legislature does have the power to restrict the court's jurisdiction in a case where appeal is accorded as a matter of right, other than a case in which a constitutional question is presented, provided appeal by permission is allowed. It is proposed therefore that appeal as of right upon the ground that the appellate division has modified the judgment or order appealed from shall be limited to cases in which the modification relates to a substantial right.[101]

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[99] N.Y. Civ. Prac. Act §§ 1307–19.

[100] CPL § 17.1.

[101] CPL § 16.1(a).

Appeal as of right based on a dissent, reversal or modification would be limited to cases in which the dissent, reversal or modification involves a portion of the appellate division's order by which the appellant is aggrieved and which is otherwise within the power of the court of appeals to review.[102]

To the Appellate Division.—The most important proposed change in respect of appeals is the proposed limitation upon the right to appeal as of right to the appellate division from non-final determinations. Originally it was proposed to permit appeal as of right only from enumerated types of orders which might dispose of the case, or which seriously affected the rights of a party. Other orders were to be appealable only if permission were granted by the judge who granted the order or by the appellate division.[103] It is now proposed, however, that appeal shall be allowed as of right in all cases now appealable as of right except in certain cases to be enumerated in the statute.

Miscellaneous

In addition to the substantial matters above referred to, numerous proposals which should improve the conduct of litigation are made. There are, of course, general provisions containing matter as to construction and definitions, mistakes, omissions, defects and irregularities and election of remedies. Separate articles govern the award of interest, the powers of referees, and the fees of clerks and other officers. The Rules of Civil Procedure contain the titles governing motion practice, appellate practice, proceedings by or against infants and incompetents, the disposition of property in litigation, undertakings, and costs. Some of these provisions are time-saving advances in procedural law. The pro forma appointment of a guardian ad litem for an infant, for instance, is not required, where the infant has a guardian of his property or is in his parent's custody.[104] In the main, however, the importance of the revision of these miscellaneous rules is found in the fact that complex existing statutes are simplified, clarified and better organized.

Conclusion

The bills which would repeal the Civil Practice Act and the Rules of Civil Practice and substitute for them the Civil Practice Law and the Rules of Civil Procedure have been pending in the legislature for a year. Numerous bar associations and many individuals have made criticisms and suggestions. Many of the suggestions made have been adopted and are incorporated in the law as proposed. Other changes will be made as a consequence of discussion and suggestions at the public hearings already held and to be held upon the pending bills. The bar should find in the proposed revision a sound and workable code for the government of litigation.

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[102] CPL § 16.1(a).

[103] CPL § 16.3(a).

[104] RCP 91.1.

THE GENEVA CONFERENCES ON THE LAW OF THE SEA AS A STEP IN THE INTERNATIONAL LAW-MAKING PROCESS

Robert H. Manley *

The law of the sea covers a broad area of international law of considerable importance. It encompasses such problems as the breadth of the territorial sea, the right of freedom of navigation on the high seas, rights to exploit the continental shelf and fishing rights on the high seas. An initial attempt to codify the law of the sea was made at the Conference for the Codification of International Law held under the auspices of the League of Nations at the Hague in March and April of 1930, where an agreed statement on the law of territorial waters was sought. However, that conference was generally unsuccessful in its efforts to codify the law of the sea.[1]

More recently, two conferences have been held under the auspices of the United Nations in attempts to codify and develop the law of the sea; namely, the conferences at Geneva, Switzerland, held in the spring of 1958 and again in the spring of 1960. A great deal of preparatory work was done prior to these conferences by the International Law Commission, a group functioning within the United Nations framework and made up of leading international lawyers and international law scholars from a number of countries. Draft articles prepared by the International Law Commission served as a basis for most of the work undertaken at both conferences. The 1958 Geneva Conference, lasting nine weeks, was convened on February 24, 1958 and adjourned April 28, 1958. The 1960 Geneva Conference opened March 16 and continued until April 27, 1960, for a total of six weeks. The first Conference has been hailed as relatively successful, if not indeed outstandingly so. The second must be viewed almost entirely as a failure.

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Much of the work on the present paper was done in connection with the participation of the author in the English-speaking section of the Centre for Studies and Research of the Hague Academy of International Law (1959 Session). The author takes this opportunity to express his appreciation to the Academy, to Mr. E. Lauterpacht (the Director of Studies of the English-speaking section), and to the other members of the section who have participated in the discussions. However, the present paper is the work exclusively of the present author and represents only his personal views.

[1] The Hague Codification Conference took up three subjects: (1) nationality; (2) territorial waters; (3) responsibility of States for damages caused in their territory to the person or property of foreigners. As to nationality, a convention and several protocols were adopted by the Conference. In the field of responsibility of States, since the committee dealing with this subject was unable to complete its study, no report was made to the Conference. With regard to territorial waters, although no convention was adopted, thirteen articles regarding the legal status of the territorial sea were provisionally approved and transmitted to the Council of the League of Nations for communication to governments. For comment on the Conference see Miller, *The Hague Codification Conference,* 24 Am. J. Int'l. L. 674 (1930). For conference documents see 24 Am. J. Int'l. L. Spec. Supp. 1–258 (1930).

At the first Conference four conventions of considerable importance were adopted and opened for signature and ratification; namely, the Convention on the Territorial Sea and the Contiguous Zone, which sets out the basis for measurement of territorial seas and defines the right of innocent passage for non-coastal states within same; the Convention on the High Seas, which declares the right of freedom of the seas of all nations and sets out certain rules in connection with the exercise of this right; the Convention on Fishing and Conservation of the Living Resources of the High Seas, which establishes a system for conserving fish and other living resources of the high seas; and the Convention on the Continental Shelf, which defines the term "continental shelf" and declares the right of coastal States to exploitation thereof. In addition to the adoption of a number of resolutions dealing with various problems of the law of the sea, the Conference adopted an optional protocol concerning the compulsory settlement of disputes arising out of the interpretation or application of any of the conventions.[2]

It was not, however, possible at the 1958 Conference to reach agreement on the breadth of the territorial sea. The United States, which traditionally has employed and supported a three-mile breadth, after finding insufficient support for passage of an article declaring such a limit, proposed a compromise providing a territorial sea of six miles and an additional six-mile area within which the coastal State would have predominant fishing rights. The Soviet Union proposed that each country determine the breadth of its territorial waters in accordance with established practice within the limits, as a rule, of three to twelve miles. There were various other proposals, but in the end it was not possible to obtain approval, by a two-thirds vote, of any provision establishing a uniform breadth of the territorial sea. Thus the Convention on the Territorial Sea and the Contiguous Zone, as adopted, is limited largely to provisions regarding the means of measuring the territorial sea and also describing the right of innocent passage within the territorial sea, but it contains no provision stipulating its breadth.

In view of its failure to reach agreement on the breadth of the territorial sea, the first Conference adopted a resolution requesting the General Assembly of the United Nations to study the advisability of convening a second conference to consider the questions not settled at the 1958 Conference. A resolution calling for such a conference was adopted by the next General Assembly Session in December of 1958. At the second Conference, a United States and Canadian proposal that would have established a six-mile territorial sea, with an adjoining six-mile zone within which, with certain limitations, the coastal State would have exclusive fishing rights, came within one vote of the necessary two-thirds majority; however, it was not possible to obtain the necessary margin for this or any other proposal on the breadth. Thus the only concrete result of the 1960 Conference was the adoption of a resolution urging that technical assistance be provided to developing nations for their fishing industries.

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[2] For Final Act, conventions, optional protocol and resolutions for the 1958 Conference see 52 AM. J. INT'L. L. 830 (1958).

In view of the importance of the subject matter and the broad participation in the Conference—more than eighty States participated—the two Geneva Conferences on the Law of the Sea provide an excellent opportunity for appraisal of the international conference approach to development of international law. The purpose of this article is to evaluate the conferences from this point of view, with particular attention focused on the first Conference.

I. THE OBJECTIVES OF THE CONFERENCES

A. *Codification or Progressive Development?*

In evaluating the Geneva Conferences on the Law of the Sea it is necessary first to determine whether the objective was a codification of existing law or a development of the law involving possible change from prior practice and a filling of gaps which might exist.

In the statute of the International Law Commission it is stated in article 15:

> In the following articles the expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.[3]

In the succeeding nine articles, the statute outlines two general procedures, the one to be followed by the Commission in connection with the development of international law and the other to be followed in connection with its codification. In fact, the distinction between development and codification is one that has been found extremely difficult to maintain. Almost any attempted codification of the law has some aspects of development and almost any development has some aspects of codification.[4] Thus, in its report on the work of its Eighth Session, a session largely taken up with the question of the law of the sea, the International Law Commission stated:

> In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the Statute between these two activities (between codification and development) can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already "sufficiently developed in

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[3] Res. 174 (11), U.N. GEN. ASS. OFF. REC. 2d Sess., at 105 (A/519) (1948).

[4] Sir Hersch Lauterpacht, in an illuminating article, stated: "In most cases the work of the Commission (International Law Commission) on a given topic partakes of the nature both of codification and development." Sir Hersch then provided examples of draft conventions which, though termed "primarily in the nature of codification," have important aspects of development and also examples of draft conventions which, while essentially concerned with the development of the law, are to some extent also codification. Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L. L. 16, 30 (1955).

> practice," but also several of the provisions adopted by the Commission, based on a "recognized principle of international law," have been framed in such a way as to place them in the "progressive development" category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either.[5]

The operative paragraph of the resolution of the General Assembly convening the 1958 Conference on the Law of the Sea failed to make any distinction between codification and development. It states:

> The General Assembly . . . decides . . . that an international conference of plenipotentiaries should be convoked to examine the law of the sea, taking account not only of the legal, but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.[6]

The proceedings of the 1958 Conference itself and particularly the conventions adopted indicate clearly that the representatives at the Conference did not deem themselves restricted to codification. In this regard, the preambular clauses of the conventions adopted by the Conference are of particular interest. Whereas the Convention on the High Seas contains a preamble stating that the parties to the Convention "desiring to codify the rules of international law relating to the high seas, recognizing that the United Nations Conference on the Law of the Sea . . . adopted the following provisions as generally declaratory of established principles of international law, have agreed as follows:", the conventions on the Territorial Sea and on the Continental Shelf begin simply with the following language: "The States Parties to this Convention Have agreed as follows:". The Convention on Fishing and Conservation of the Living Resources of the Sea has two preambular paragraphs, but they provide the background for the provisions which follow and do not indicate that this convention is a codification. Of the four conventions adopted, it is most clearly a development of the law as opposed to a codification.[7]

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[5] U.N. GEN. ASS. OFF. REC. 11th Sess., Supp. No. 9, at 3 (A/3159) (1956).

[6] Res. 1105 (XI), U.N. GEN. ASS. OFF. REC. 11th Sess., Supp. No. 17, at 54 (A/3572) (1958), reprinted in 2 U.N. CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS xi (A/CONF. 13/38) (U.N. Pub. Sales No. 58. V.4) (1958) [hereinafter cited as OFFICIAL RECORDS]. The reference to technical, biological, economic and political aspects is not without significance in regard to the question of whether the Conference's task was to be codification or development. If these aspects were to be taken into account, the implication is that the task was considered, at least to some extent, developmental.

Paragraph 9 of the Assembly's resolution "refers to the conference the report of the International Law Commission as the basis for its consideration of the various problems involved in the development and codification of the law of the sea. . . ." Thus, both codification and development were referred to, but in such a way as to indicate that the Conference's task was to encompass both.

[7] The preamble to the Convention on Fishing and Conservation of the Living Resources of the High Seas provides:

> *The States Parties to this Convention,*
> *Considering* that the development of modern techniques for the exploitation of the living resources of the sea, increasing man's ability to meet the need of the world's

It is not intended in this article to consider the question of how much each of the conventions is a codification of international law and how much a development of it, but it would seem clear that the Fisheries Convention is essentially developmental, in that it introduces a new system for conservation of living resources of the high seas, that the Continental Shelf Convention is developmental to a considerable extent, since international law in this field was still in a formative stage at the time of the Convention's adoption; and that the Convention on the Territorial Sea and even the Convention on the High Seas must be considered developmental to some extent.[8]

B. *The Approach: Juridical or Non-Juridical?*

A further question of importance is whether the Conferences approached their task solely from a juridical viewpoint or whether economic, political and other factors were taken into account.

The answer must be clear that they were anything but purely juridicial exercises. This would naturally follow from various factors; namely, (1) the strategic and economic importance of the sea to the nations and thus the necessary political and economic implications of the law of the sea; (2) the fact that, as previously indicated, the Conferences were not merely attempting to codify the existing law but were to a large extent engaged in developing it; and (3) so far as the 1958 Conference was concerned, the scope of the topics with which it dealt. Thus, the General Assembly in its resolution convening the 1958 Conference stated that the Conference should take account, not only of the legal but also of ". . . the technical, biological, economic and political aspects of the problem. . . ." [9]

A number of instances can be given of acknowledgement by representatives at the 1958 Conference, either in the course of the Conference proceedings or in subsequent writings, of the economic and political interests involved in the matters under consideration. Mr. Arthur Dean, chairman of the United States delegation, has been quite frank about the economic and strategic interests of the United States with relation to the law of the sea in certain of his comments on the Conference. He has stated, after

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expanding population for food, has exposed some of these resources to the danger of being over-exploited,

Considering also that the nature of the problems involved in the conservation of the living resources of the high seas is such that there is a clear necessity that they be solved, whenever possible, on the basis of international cooperation through the concerted action of all the States concerned,

Have agreed as follows. . . . U.N. Doc. No. A/CONF. 13/L.54 (1958), reprinted in 2 OFFICIAL RECORDS 139.

[8] For a discussion of developmental as opposed to codification aspects of the four conventions adopted at the 1958 Conference see Verzijl, *The United Nations Conference on the Law of the Sea, Geneva 1958, Part I.*, 6 NETHERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 1 (1959). (See particularly pages 8 and 9.) The 1960 Conference, devoted almost entirely to seeking agreement on the breadth of the territorial sea, had as its objective an essentially developmental task since views of what the breadth should be were relatively diverse.

[9] Res. 1105 (XI), U.N. GEN. ASS. OFF. REC. 11th Sess., Supp. No. 17, at 54 (A/3572) (1958), reprinted in 2 OFFICIAL RECORDS xi.

asserting that the United States adopted as its first goal at the Conference the preservation of the three mile limit rule: "It did so, not simply because that limit has long been recognized in international law, but for compelling military and commercial reasons." [10] He has also stated: "An extension of the territorial sea threatens the security of the United States by reducing the efficiency of its naval and air power and by subjecting it to an increased risk of surprise attack." [11]

Speaking as a representative of one of the smaller nations, the chairman of the Jordanian delegation, Mr. Shukri Muhtadi, in his contribution to the general debate in the First Committee (Territorial Sea and Contiguous Zone), asserted that the great maritime powers wanted a narrow territorial sea and the smaller nations a wider belt because "the great maritime powers were mainly concerned with maintaining the freedom of the high seas which they could utilize to their advantage; the smaller nations were mainly concerned with the defence of their own shores." [12]

Dr. Max Sörensen, the chairman of the Danish delegation, began his contribution to the general debate in the First Committee by commenting on the importance of the sea to Denmark—both in view of the fact that her ships carried cargoes in the service of many nations and because of the dependence of the local population in certain parts of Denmark, the Faroe Islands and Greenland on the sea for a livelihood because of the meager resources of the land. In the course of his comments, he often referred to the economic interest of coastal states, particularly in connection with fishing rights.[13]

German interest in exploitation of the resources of the world's continental shelves was reflected in comments by the chairman of that country's delegation, Ambassador Peter H. Pfeiffer, in his contribution to the general debate in the Fourth Committee (Continental Shelf).[14]

Indonesian interest in special rules for the delimitation of the territorial sea around archipelagoes was stressed in the statement of the chairman of that State's delegation. Ambassador Achmad Subardjo Djoyoadisuryo, speaking in the general debate of the First Committee, stated that he recognized that it would be "advisable to adopt a uniform limit," but emphasized that "in drafting a uniform rule, due account must be taken of the economic and security needs of certain states. . . . [and] that provision should therefore be made for departures from the rule, if necessary, in special circumstances." [15]

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[10] Dean, *The Geneva Conference on the Law of the Sea: What was Accomplished,* 52 Am. J. Int'l. L. 607, 610 (1958).

[11] *Ibid.* The same author, laying stress upon the implications of a 12-mile territorial sea for submarine warfare, has stated: "[T]he extension of the territorial sea of neutral nations might in many instances increase the striking power of enemy submarines. This is because normally submarines cannot safely operate within 3 miles of the shore. However, if the territorial sea were extended to 12 miles, an enemy submarine (particularly a nuclear submarine which could operate silently for long periods without surfacing) would be able to move about undetected in a neutral state's territorial sea, whereas our surface ships could not operate there without violating the state's neutrality." Dean, *Freedom of the Seas,* 37 Foreign Affairs 83, 90 (1958).

[12] 3 Official Records 18.

[13] 3 *id.* at 4–5.

[14] 6 *id.* at 7–8.

A unique economic interest was referred to by the representative of Peru on the Second Committee (High Seas: General Regime) when he commented on the importance to the Peruvian economy of guano, valuable as a fertilizer, produced by birds living off the Peruvian coast, continued supply of which product was threatened by heavy fishing for anchovies on which the birds feed.[16]

In contrast with conflicting national interests relating to economic, political and strategic implications of various rules adopted as part of the law of the sea, it is perhaps desirable to take note of the interest, expressed in various ways during the 1958 Conference, in the development of agreed rules—even, perhaps, rules at certain points in conflict with immediate national economic or security interests, in order to prevent anarchical situations in the use of the seas. The United States' compromise proposal with regard to the breadth of the territorial sea may be mentioned in this context. In introducing this proposal at the plenary session, Mr. Dean stated that the United States Government was submitting "its proposal . . . for final action with one main objective in view: that of obtaining between nations a fair and reasonable agreement on the matter." [17] Further observations by Mr. Dean were summarized as follows:

> In calling on delegations to support its proposal, the United States delegation was acutely aware of the sacrifice which it entailed for its own country and people. It was equally aware that acceptance of the proposal might entail equal sacrifice on the part of others. However, his delegation was convinced that the aim of achieving a sound and lasting agreement among nations on the issues before the meeting fully justified any such sacrifice.[18]

The following summary relates to comments made by Mr. J. H. W. Verzijl, chairman of the Netherlands delegation, on the compromise proposal in the First Committee:

> . . . [H]e had maintained close contact with his government in deciding how far his delegation could agree to depart from clearly established and sound principles of international law. Too much stress had been laid on national at the expense of the general interests, but the Netherlands was prepared to make some sacrifice in order to prevent the failure of the Conference, a failure which would be followed by legal chaos.[19]

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[15] 3 *id.* at 14. Mr. Subardjo expressed regret that the International Law Commission had been unable to draft a provision regarding delimitation of the territorial sea around a group of islands or an archipelago. Hope was expressed that the ILC's draft would be supplemented by the addition of a provision regulating the question of groups of islands as a single geographic or economic unit, and covering cases in which such groups were situated in the middle of an ocean. 3 *id.* at 15.

[16] 4 *id.* at 17.

[17] 2 *id.* at 35.

[18] 2 *id.* at 36. Statements of the delegates as reported in the Official Records are summarized, resulting in use of the third person in reference to speakers.

[19] 3 *id.* at 169.

However, referring to the gaps in the conventions adopted, particularly with regard to the width of the territorial sea, Professor Sörensen has stated:

> The material interests involved, whether of national economy or military security, are so considerable that governments hesitate to make concessions for the sole purpose of reaching a solution. From the national point of view, uncertainty on a point of international law is often preferable to a certainty that leaves no room for unilateral action or maneuvering. The long-term advantage that the rule of law in international relations so clearly has over anarchy is valued regrettably and erroneously low.[20]

In view of observations such as those expressed with regard to the United States compromise proposal, it is impossible to say that the approach to the solution of the problems before the 1958 Conference was entirely non-juridical, even though in these instances the emphasis was placed on the need for the acceptance of a rule of law rather than on the recognition of the existence of an objective ascertained rule.[21]

C. *Form of Conference Conclusions*

A final question as to conference objectives relates to the form its conclusions should take. Were the conclusions to be embodied in conventions open for signature and ratification, or was there merely to be publication of declarations or resolutions, or was some other form to be utilized?

The International Law Commission, in its report on the work of its Eighth Session, after commenting on the difficulties of maintaining a distinction between codification and progressive development with regard to the law of the sea, stated: "In these circumstances, in order to give effect to the project as a whole, it will be necessary to have recourse to conventional means." [22] However, the report recommended to the General Assembly the convening of an international conference to examine the law of the sea ". . . and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate." [23]

In its resolution convening the Conference, the General Assembly adopted the words of the Commission, providing in numbered paragraph 2 that the Conference should ". . . embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate." [24] The Report of the Secretary-General on the Method of

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[20] Sörensen, *Law of the Sea*, INTERNATIONAL CONCILIATION No. 520 at 253 (1958).

[21] It is obvious that non-juridical factors must have been of considerable importance in connection with the 1960 Geneva Conference. Statements quoted above from the record of the 1958 Conference indicate the strategic and economic factors involved in establishment of the breadth of territorial waters and fishing limits, and establishment of such limits was the sole concern of the 1960 Conference.

[22] U.N. GEN. ASS. OFF. REC. 11th Sess., Supp. No. 9 (A/3159) (1956).

[23] *Ibid.*

[24] Res. 1105 (XI), U.N. GEN. ASS. OFF. REC. 11th Sess., Supp. No. 17, at 54 (A/3572) (1958), reprinted in 2 OFFICIAL RECORDS xi.

Work and Procedures of the Conference took note of this provision of the General Assembly resolution and commented:

> [T]he number and diversity of the problems with which the Conference will have to deal seem to require that it should be free to adopt a number of different kinds of instruments according to its discretion, and should not necessarily try to compress all the results of its work in a single instrument. At the same time the possibility of a single instrument should not be excluded, if the Conference deems such a solution to be preferable.[25]

Thus, it is clear that the Conference was free to utilize whatever form it deemed best for its conclusions. Decisions as to whether conventions, declarations or resolutions were to be utilized, and whether in one instrument or several, were not, in fact, taken by the Conference until its later stages.

Two of the Conference committees (Conservation of Living Resources and Continental Shelf) recommended use of separate conventions for articles considered by them, which recommendations were subsequently adopted by plenary sessions.[26] However, both the First and Second Committees (Territorial Sea and High Seas) decided to leave the matter of the form of instruments to plenary sessions.[27] The Fifth Committee (Access to the Sea of Land-Locked Countries) recommended that an article providing for free access to the sea for states having no seacoast be inserted ". . . at an appropriate place in one of the conventions to be adopted by the Conference." [28]

In plenary debates there was a certain amount of sentiment in favor of declarations as opposed to conventions. Thus, in the eleventh plenary meeting, the chairman of the South African delegation, Mr. D. B. Sole, proposed that the work of the Second Committee be embodied in a declaration of the Conference, to be adopted by a two-thirds majority of the members present and voting, that "the following are, as of the date of the adoption of this declaration, principles of international law relating to the high seas. . . ." [29] In addition he proposed a supplemental protocol open for signature and ratification, under the terms of which States would accept the declaration as binding.[30] This proposal was not adopted, however, and the articles dealing with the high seas took the form of a separate convention, as did likewise the articles considered by the Committees on the Territorial Sea, Conservation of Living Resources and the Continental Shelf.[31]

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[25] *Method of Work and Procedures of the Conference Report of the Secretary-General,* U.N. Doc. No. A/CONF. 13/11 (1958), reprinted in 1 Official Records 172, 173.

[26] *Report of the Third Committee,* U.N. Doc. No. A/CONF. 13/L.21 (1958), reprinted in 2 Official Records 102, 107 and *Report of the Fourth Committee,* U.N. Doc. No. A/CONF. 13/L.12 (1958), reprinted in 2 Official Records 89, 90.

[27] *Report of the First Committee,* U.N. Doc. No. A/CONF. 13/L.28/Rev. 1 (1958), reprinted in 2 Official Records 115, 123 and *Report of the Second Committee,* U.N. Doc. No. A/CONF. 13/L.17 (1958), reprinted in 2 Official Records 94, 99.

[28] *Report of the Fifth Committee,* U.N. Doc. No. A/CONF. 13/L.11 (1958), reprinted in 2 Official Records 85, 88.

[29] 2 Official Records 24–25. Mr. Colclough, speaking for the United States, tentatively endorsed the proposal. 2 *id.* at 25.

[30] 2 *id.* at 25.

II. The Technique of the Conferences

A. *Participation*

So far as technique is concerned, one important aspect is the question of what States were permitted and what States were not permitted to participate in the Conferences. The key references with regard to participation are the resolutions of the General Assembly of the United Nations convening the Conferences. Paragraph 5 of the resolution convening the 1958 Conference provides: "The General Assembly . . . invites all States Members of the United Nations and States Members of the specialized agencies to participate in the conference and to include among their representatives experts competent in the field to be considered."[32] As a result of this paragraph, notification of the 1958 Conference was sent to all members of the United Nations (including the Byelorussian Soviet Socialist Republic and the Ukranian Soviet Socialist Republic, both of which sent delegations to the Conference) as well as to the following States as members of specialized agencies: Federal Republic of Germany, Republic of Korea, San Marino, Monaco, Switzerland, Viet-Nam and the Vatican City.[33]

The formula governing participation in the Conference was, in essence, adopted in the designation of States eligible to become parties to the convention. Thus, the signature clauses read: "This Convention shall, until 31 October 1958, be open for signature by all States Members of the United Nations or of any of the specialized agencies, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention." Accession is limited by the accession clauses to the States belonging to the categories eligible to become signatories.[34]

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[31] In keeping with the recommendations of the Fifth Committee, the article providing for access to the sea from states having no seacoast was incorporated in the Convention on the High Seas as article 3. Changes recommended by the Fifth Committee in articles dealing with innocent passage and the use of the high seas, making them applicable to non-coastal as well as coastal states, were incorporated in article 14 of the Convention on the Territorial Sea and the Contiguous Zone and in articles 2 and 4 of the Convention on the High Seas.

The 1960 Conference not having reached agreement on the breadth of the territorial sea, the question of the form in which conclusions should be embodied was not reached. However, it seems likely that had the necessary two-thirds vote been mustered, the provision or provisions adopted would have been incorporated in an optional protocol to the Convention on the Territorial Sea and the Contiguous Zone.

[32] Res. 1105 (XI), U.N. Gen. Ass. Off. Rec. 11th Sess., Supp. No. 17, at 54 (A/3572) (1958), reprinted in 2 Official Records xi. The wording of the resolution convening the 1960 Conference is identical as to States invited to participate. Res. 1301 (XIII), U.N. Gen. Ass. Off. Rec. 13th Sess., Supp. No. 18, at 54 (A/4090) (1958). *Preparation of the Conference: Report of the Secretary-General,* U.N. Doc. No. A/CONF. 13/20 (1958), reprinted in 1 Official Records 303.

[33] *Preparation of the Conference: Report of the Secretary-General,* U.N. Doc. No. A/CONF. 13/20 (1958), reprinted in 1 Official Records 303.

[34] 2 Official Records 127. The vote in plenary with regard to adoption of the signature

B. *Utilization of Committees*

As was asserted in the Report of the Secretary-General on the Method of Work and Procedures of the Conference, the wide scope of the 1958 Conference made it necessary that the greater part of the work be accomplished in committee.[35] The rules of procedure adopted by the Conference therefore provided for five main committees: the First Committee to deal with the Territorial Sea and Contiguous Zone; the Second to deal with the High Seas: General Regime; the Third to deal with the High Seas: Fishing: Conservation of Living Resources; the Fourth to deal with the Continental Shelf; and the Fifth to deal with the Question of Free Access to the Sea of Land-locked Countries.[36] These committees did the main detail work of the Conference, and from February 28 to April 21, 1958 there were only two short meetings, in plenary session, the remainder of the work being done either in the main committees, the General (steering) Committee or the Drafting Committee.

In the case of the 1960 Conference, since the conference was to deal with the breadth of the territorial sea and fishery limits, a Committee of the Whole was utilized, rather than a number of committees on different subjects.[37]

C. *Work of the "General" Committee*

Rule 13 of the rules of procedure for the 1958 Conference provided for a General Committee of nineteen members, comprised of the President of the Conference, who was to act as chairman, the Vice-Presidents (thirteen in number) and the chairmen of the main committees.[38] As provided in rule 15, the General Committee was to assist the President in the general conduct of the business of the Conference and, subject to the decisions of the Conference, to ensure the coordination of its work. During the Conference, the General Committee performed such important functions as establishing, subject to plenary approval, the working schedule of the Conference and its closing date, deciding on whether a general debate should be held in the plenary meetings, recommending the composition of the drafting committee, and taking steps to expedite the work of the conference.[39]

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and accession clauses is recorded at 2 OFFICIAL RECORDS 54. Discussion of the signature and accession clauses, with views expressed by the Soviet Union and several other States that the clauses, as later adopted, were too restrictive, may be found at 2 *id.* at 51–54.

[35] 1 *id.* 172–73.

[36] *Rules of Procedure,* Rule 47, reprinted in 2 OFFICIAL RECORDS xxxiv.

[37] *Method of Work and Procedures of the Conference,* U.N. Doc. No. A/CONF. 19/3 (1960); *Provisional Rules of Procedure,* U.N. Doc. No. A/CONF. 19/2 (1960).

[38] Rule 13 also provides that no two members of the General Committee shall be drawn from the same delegation and that the General Committee is to be so constituted as to insure its representative character. *Rules of Procedure,* Rule 13, 2 OFFICIAL RECORDS xxxi-xxxii. Rule 14 further provides that a Vice President shall not have the right to vote on the General Committee if he is of the same delegation as another member on that Committee. *Rules of Procedure,* Rule 14, 2 *id.* xxxii.

[39] Recommendation as to the working schedule of the Conference, its closing date and the

D. *Voting Rules*

One of the features of the Conferences was the equality of vote of all participating States. Rule 34 of the rules of procedure for the 1958 Conference provided that each State represented at the Conference would have one vote. Thus, it was always possible, in the proceedings of the Conference, for land-locked States or States making relatively little use of the seas to have decisive influence in close votes.[40] A quorum, under rule 18, was constituted by the representatives of a majority of the States participating in the Conference.

Decisions of the Conference (plenary sessions) "on all matters of substance" were to be taken by a two-thirds majority of the representatives present and voting. Decisions of the Conference on matters of procedure were to be taken by a majority of the representatives present and voting. Where a question arose as to whether a matter was one of procedure or of substance the President was to rule. If appealed from, the President's ruling would stand unless overruled by a majority of the representatives present and voting. The phrase "representatives present and voting" was defined to mean representatives present and casting an affirmative or negative vote. Representatives abstaining were not considered as voting.[41]

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holding of general debates were contained in the *First Report of the General Committee,* U.N. Doc. No. A/CONF. 13/L. 2 (1958), reprinted in 2 OFFICIAL RECORDS 83. These recommendations were adopted without discussion at the fourth plenary meeting of the Conference. 2 *id.* at 6. Recommendations as to measures to expedite the work of the Conference are contained in the *Second Report of the General Committee,* U.N. Doc. No. A/CONF. 13/8 (1958), reprinted in 2 OFFICIAL RECORDS 84. Recommendations as to the composition of the Drafting Committee are contained in the *Third Report of the General Committee,* incorporated in substance in the summary record of the sixth plenary meeting, 2 *id.* at 7.

A General Committee of 19 members was likewise utilized under the rules of procedure for the 1960 Conference. Seventeen vice-presidents were provided for, who, with the President and the Chairman of the Committee of the Whole, comprised the committee's membership. *Method of Work and Procedure of the Conference, supra* note 37; *Provisional Rules of Procedure,* Rule 14, *supra* note 37.

[40] The votes of land-locked States, however, were not decisive either with regard to the close vote in the First Committee adopting amended paragraph 4 of article 16 (innocent passage through straits) or with regard to the vote in plenary rejecting the U. S. compromise proposal on the breadth of the territorial sea. For breakdown of votes see 3 OFFICIAL RECORDS 100 (with regard to innocent passage through straits) and 2 *id.* at 39 (with regard to the U. S. compromise proposal).

[41] *Rules of Procedure,* Rules 35–36, 2 OFFICIAL RECORDS xxxiii-xxxiv. A similarity to voting rules in the United Nations General Assembly may be noted. Under article 18 of the United Nations Charter decisions of the General Assembly on "important questions" (some of which are enumerated) are to be made by a two-thirds majority of the members present and voting. Decisions on "other questions," including the determination of additional categories of questions to be decided by a two-thirds majority, are to be made by a majority of the members present and voting. For a survey of voting rules in the United Nations, League of Nations, various specialized agencies and a number of international conferences, reference may be made to paragraph 28, footnote 7 of *Method of Work and Procedures of the Conference: Report of the Secretary-General,* U.N. Doc. No. A/CONF. 13/11 (1958), 1 OFFICIAL RECORDS 172, 175; Jessup, *Parliamentary Diplomacy,* 89 RECEUIL DES COURS 185, 241–47 (1956); DUNN, PRACTICE AND PROCEDURES OF INTERNATIONAL CONFERENCES 212–15 (1929); and PASTUHOV, GUIDE TO INTERNATIONAL CONFERENCES 134–45 (1944).

With regard to voting in the committees, it was provided that decisions were to be taken by vote of a majority of the representatives present and voting.[42] The voting rules for the 1960 Conference, both for plenary and committee sessions, were identical to those for the 1958 Conference.[43]

It is interesting to note that the rules with regard to voting adopted for the Geneva Conferences on the Law of the Sea were to some extent the reverse of those adopted at the Hague Conference for the Codification of International Law of 1930. Under rule XX of the Hague rules of procedure, a vote in committee of at least two-thirds "of the delegations present at the meeting at which the vote takes place" was required for the embodiment of provisions in a draft convention of protocol, other than a "special protocol," for which a majority vote sufficed. However, the draft conventions and protocols presented by the committee could, as provided in rule XXIII, be adopted by the Conference by the vote of a "simple majority of the delegations present at the meeting at which the vote takes place." [44]

It is submitted that the rules for voting adopted for the Geneva Conference constitute an improvement over those adopted for the Hague Conference. The effect of the Hague rules was to prevent consideration by the Conference as a whole of provisions, other than special protocols, which failed of two-thirds approval in committee. Under the Geneva rules, only a majority vote was needed for committee approval, and even without such approval, plenary sessions were entitled to consider proposals of delegations.[45] The Geneva procedure seems sound since it permits an opportunity for the working of what has been termed "conference diplomacy" between the time of a committee vote, which may approve a provision by a bare majority or possibly even reject it, and a vote in plenary.[46] An added factor in favor of the Geneva procedure is that it permits consideration in plenary session, where most or all of a State's representatives, including the chairman of the delegation, can be present.

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[42] *Rules of Procedure*, Rule 53, 2 Official Records xxxv. In view of the fact that under rule 53 the rules relating to voting in plenary are to apply "mutatis mutandis" to voting in committee (aside from the majority vote rule), the same definition as to "representatives present and voting" provided with respect to plenary voting would hold for committee voting. Under rule 52, in the case of committees, a quorum is constituted by a majority of the representatives on the committee. *Rules of Procedure*, Rule 52, 2 Official Records xxxv.

[43] *Provisional Rules of Procedure*, Rules 34–36, 49, *supra* note 37.

[44] The rules of procedure for the Hague Conference are contained in *Acts of the Conference for the Codification of International Law held at The Hague March 13th to April 12, 1930*, vol. 1, n. 6. Rule XX is reproduced at 1 Official Records 174 (1958 Geneva Conference) 174. Rule XX does provide that "In the case of provisions which have secured only a simple majority, a Committee, at the request of at least five delegations, may decide by a simple majority whether such provisions are to be made the object of a special protocol open for signature or accession." This rule also provides for the adoption by Committees of recommendations and *voeux* by a simple majority. Under rule XXIII such special protocols, recommendations or *voeux* could be adopted, as in the case of draft conventions and other protocols, by the Conference itself by a simple majority vote.

[45] Thus in the case of article 3, dealing with the breadth of the territorial sea, although the U. S. "compromise proposal" was rejected in committee by a vote of 38–36 (3 Official Records 179–80), it was re-introduced in plenary, receiving a 45–33 vote but failing of adoption for want of the required two-thirds majority. 2 *id.* at 39.

At the 1960 Conference, the joint United States-Canadian proposal received 43 favorable, 33 against, 12 abstentions in the Committee of the Whole, thereby obtaining the necessary majority in committee. In plenary, however, it failed of the two-thirds margin, with the vote 54 in favor, 38 against, with 5 abstentions. *United Nations Digest*, United Nations Review, May, 1960, p. 45; June, 1960, p. 55.

E. *Problems of Coordination*

As previously noted, one of the functions of the General Committee of the 1958 Conference, as provided in rule 15 of the rules of procedure, was to ensure the coordination of the work of the Conference. Further, under rule 50, questions affecting the coordination of their work could be referred by committees to the General Committee, "which may make arrangements as it thinks fit, including the holding of joint meetings of committees or subcommittees and the establishment of joint working groups."

No instance during the 1958 Conference has been found in which the provisions of rule 50 were utilized. However, recommendations of the General Committee having a bearing on the problem of coordination can be found in the General Committee's first and second reports. In the first report it was recommended that not more than three committee meetings should take place at the same time and that in any case, simultaneous meetings of the first and third committees should be avoided.[47] In the second report, delegations were urged to study carefully the amendments they had submitted with a view to ascertaining whether those to which they attached lesser importance could be withdrawn. Delegations were also urged to consult together informally in order to combine amendments embodying substantially the same points.[48]

At least one instance in which the Drafting Committee performed functions with regard to coordination during the 1958 Conference may be cited. In the meeting of the Drafting Committee held on April 23, procedures for the handling by the Conference of the three proposals of Switzerland, Columbia and the Netherlands with regard to the judicial settlement of disputes were worked out in consultation with representatives of those countries.[49]

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[46] As an example of an important provision which was approved in committee by less than two-thirds vote but received the necessary two-thirds approval in plenary, paragraph 4 of article 16 of the Convention on the Territorial Sea and Contiguous Zone, dealing with the right of innocent passage in straits, may be cited. In committee the paragraph, which later was incorporated in the Convention with certain drafting changes, was adopted by a vote of 31–30 with 10 abstentions. 3 OFFICIAL RECORDS 100. In plenary, after an unsuccessful attempt to have paragraph 4 voted separately from other provisions of the article (defeated 34–32 with 6 abstentions), the article as a whole was adopted 62–1 with 9 abstentions. 2 OFFICIAL RECORDS 65.

[47] 2 *id.* at 83.

[48] 2 *id.* at 84.

[49] *Fourth Report of the Drafting Committee of the Conference,* U.N. Doc. No. A/CONF. 13/L. 24 (1958), reprinted in 2 OFFICIAL RECORDS 110. The functions of the General Com-

F. *Problems of Drafting*

Under the provisions of rule 49 for the 1958 Conference, a Drafting Committee, composed of not more than nine members, was to be appointed by the Conference on the proposal of the General Committee. This committee was to be entrusted with the final drafting and coordination of the instruments approved by the committees of the Conference. It was also to prepare the Final Act of the Conference.[50] The Drafting Committee was appointed, on the recommendation of the General Committee, by the sixth plenary meeting held April 14.[51] By this time the Conference had been in session some seven weeks. Apparently the delay in the appointment of the Drafting Committee was due to the fact that none of the main committees had, as of April 14, submitted their final reports.[52]

The Drafting Committee held a number of meetings, issuing eleven reports in all, and proposed a number of changes in texts as adopted by the main committees.[53] Doubtless it made very important contributions to the work of the Conference, but it can hardly be said that the results, as embodied in the conventions, are flawless from a drafting viewpoint. Often, however, unsatisfactory drafting results, at least in part, from the fact that vague terminology must be resorted to in order to permit adoption of provisions with regard to which, in terms of votes, there are closely balanced clashes of interests or views. Notable examples of questionable

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mittee for the 1960 Conference likewise included coordination of work of the Conference. *Provisional Rules of Procedure,* Rule 15, *supra* note 37.

[50] With regard to the functions and composition of the Drafting Committee (1958 Conference), it was stated in paragraphs 25 and 26 of *Method of Work and Procedures of the Conference: Report of the Secretary-General,* U.N. Doc. No. A/CONF. 13/11 (1958), reprinted in 1 OFFICIAL RECORDS 172, 174: "This committee . . . should have no responsibility for the substance of the provisions to be approved by the Conference. Its duties, as suggested in the rules, should be rather those of ensuring consistency within one and the same instrument, and coordination between different instruments to be adopted by the Conference. It would also be responsible for preparing the Final Act of the Conference, and it might render valuable assistance in drafting the preambular and final clauses of the various conventions and other instruments that might be adopted. In order that the drafting committee may discharge these responsibilities properly, it is considered essential that its membership should not be unduly large. For this reason a membership of nine has been proposed. Moreover, although it is desirable that the various languages and legal systems should be adequately represented on this committee, the main qualification for appointment should be experience in legal draftsmanship. It would also be desirable that a member or members with scientific qualifications be included in the composition of this committee."

[51] 2 OFFICIAL RECORDS 7. The delegates appointed to the Committee were Ambassador Liu Chieh (China), Professor Jaroslav Z̄ourek (Czechoslovakia), Ambassador José Antonio Correa (Ecuador), Professor André Gros (France), Mr. Zulfiqar Ali Bhutto (Pakistan), Mr. Manuel Lacleta (Spain), Mr. G. I. Tunkin (U.S.S.R.), Sir Gerald Fitzmaurice (United Kingdom) and Mr. Arthur H. Dean (U.S.A.). However, the Conference President, in announcing the General Committee's recommendations for membership of the Drafting Committee stated: "Each member would, of course, have the right to nominate an alternate." *Id.* at 7.

[52] The first main committee report submitted was that of the Fifth Committee, dated 19 April. U.N. Doc. No. A/CONF. 13/L. 11 (1958).

[53] See index, 2 OFFICIAL RECORDS vii-ix.

drafting, all of which to some extent resulted from disagreements of substance among the Conference participants, are the following: the use in article 19 of the Convention on the Territorial Sea and the Contiguous Zone of the equivocal words "should not," with regard to the exercise of criminal jurisdiction of the coastal State on board a foreign ship passing through the territorial sea, leaving in doubt the effect of this provision; the use of the terms "commercial" and "non-commercial" in articles 21 and 22 of the same convention without a definition of the terms;[54] the use of the term "genuine link" in article 5 of the Convention on the High Seas without definition or explanation except with reference to the exercise of jurisdiction and control by the flag State—matters which can more logically be considered the results of the existence of a link than facts establishing its existence.

Commenting on unsatisfactory drafting reflected in the conventions, Professor Verzijl has suggested the following reasons: (1) predominant political concern of many delegations, with a resultant disinterest in accurate drafting;[55] (2) apprehension of many of the small delegations with regard to deviating from the text of the International Law Commission drafts previously examined in their respective capitals;[56] (3) difficulties of accurate drafting in a large gathering;[57] (4) a lack of time at the final stage of the Conference;[58] (5) the function of a Drafting Committee "which was merely a parody."[59]

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[54] Likewise, the term "non-commercial" with regard to ships on government service is used in article 9 of the Convention on the High Seas without any definition of this term.

[55] Verzijl, *The United Nations Conference on the Law of the Sea, Geneva 1958—Part I,* 6 NETHERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 2, 29 (1959).

[56] *Id.* at 2.

[57] Verzijl, *The United Nations Conference on the Law of the Sea, Geneva 1958—Part II,* 6 NETHERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 115, 138 (1959). Commenting along the same line, Professor Sörensen has stated: "A Conference of 86 states organized and proceeding like the United Nations General Assembly, and deliberating in a similarly political atmosphere, is not the most appropriate body for the detailed consideration of legal provisions. The draft rules of the International Law Commission, although admittedly subject to improvement on many points of detail, were nevertheless a more coherent product than the conventions adopted by the Conference. Sörensen, *Law of the Sea,* INTERNATIONAL CONCILIATION No. 520 at 254 (1958).

[58] Verzijl, *supra* note 57, at 138. Since the delegates spent one week in initial organizational details such as the election of officers and approximately three in general debate in committee, time available for actual consideration of International Law Commission drafts and other proposals was limited. Apparently it was necessary to conclude the Conference by April 27 because of demands for the space utilized by the Conference.

[59] *Ibid.* Just what is meant by this comment is not clear. Perhaps it is Professor Verzijl's view that the Drafting Committee restricted itself to minor verbal changes in the drafts as adopted in committee to too great an extent, refraining from attempting more basic improvements which might have reopened controversy as to substance.

The Provisional Rules of Procedure for the 1960 Conference did not establish a drafting committee. *The Method of Work and Procedures of the Conference* contains the statement: "No special rule establishing a Drafting Committee is included in the rules of procedure of the present Conference, but under the general rule on the establishment of committees and sub-committees, the Conference is free to set up such a committee if it is considered desirable." *Method of Work and Procedures of the Conference, supra* note 37.

III. Results of the Conferences

A. *Positive Results*

As to the results of the 1958 Geneva Conference on the Law of the Sea, it may be asserted on the positive side that four conventions of considerable importance were adopted and opened for signature and ratification and that several resolutions as well as an optional protocol concerning compulsory settlement of disputes were adopted. A number of writers have commented favorably on the results. Professor Jessup has stated:

> At present it seems safe to say that it was a successful conference and that irrespective of the fate of some of the conventions, the Conference achieved enough clarification and wide enough measure of agreement to have justified the very considerable effort.[60]

Professor Jennings has commented:

> It is encouraging and perhaps significant that the Conference was a considerable success. Four conventions of very great value and importance were adopted; and though of course they still await the necessarily slow process of ratification, they are already the starting point for the discussion of the matters they cover.[61]

Professor Max Sörensen has stated:

> The law of the sea as it stands today is in many respects more certain and definite than it was before the Geneva Conference. A great many rules of customary international law have been expressly confirmed and new formulas have been adopted to settle a number of issues that have given rise to doubt and controversy in recent practice. Nobody who studies the four conventions with an unprejudiced mind can fail to be favorably impressed by the wide range of subjects regulated. With the possible exception of the Fishing Convention, which is intended to establish a new legal system, the texts as they stand will carry great weight whenever invoked in legal argument, even against states that may not ratify the conventions.[62]

As to the 1960 Conference, little can be said on the positive side. The United States-Canadian proposal for a six-mile territorial sea, with six more miles for exclusive fishing by the coastal state (subject to some limitations), did come closer to acceptance than the previous and similar United States compromise proposal in the 1958 Conference, but with this and all other proposals on breadth failing of passage, the Conference concluded without having produced any significant results.

B. *Negative Results*

On the negative side, the shortcomings in drafting of the conventions produced at the 1958 Conference have already been referred to. In addition, and probably of greater consequence, is the gap left in the Convention on the Territorial Seas and Contiguous Zone by the failure to agree at either Conference on the breadth of the territorial sea. It must also be said that the matters of reservations, revision and denunciation were not given satisfactory treatment in the conventions adopted at the 1958 Conference.

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[60] Jessup, *The United Nations Conference on the Law of the Sea*, 59 Colum. L. Rev. 234 (1959).

[61] Jennings, *The Progress of International Law*, 15 British Yearbook of Int'l Law 334, 346 (1958).

[62] Sörensen, *Law of the Sea*, International Conciliation No. 520 at 253 (1958).

Whereas the conventions on the Continental Shelf and Conservation of Living Resources contain clauses authorizing reservations, except with regard to specified articles, those on the Territorial Sea and the High Seas contain no provision of any kind with regard to reservations. In view of conflicting assertions in the course of debates in plenary as to the effect of silence on reservations,[63] the situation as to permissibility of reservations to these conventions is uncertain.[64]

As to revision, all of the conventions contain clauses providing that after five years from their entry into effect, request for revision may be made by any contracting party, by means of a notification in writing to the Secretary-General of the United Nations. Under the second paragraph of the revision articles, the General Assembly is to decide upon the steps, "if any," to be taken in respect to such requests. Although the effect of these clauses is not entirely clear, it would seem that they provide no assurance to States desiring revision that any action to that end will actually be taken. The General Assembly may decide that no steps which might lead to revision, such as the convening of a conference for this purpose, should be taken. And even if a conference is convened, there is equally no assurance that the revisions desired will be adopted. In this event, the State originally requesting revision has no apparent remedy, for none of the conventions contains a denunciation clause. In its sixth report, the Drafting Committee, after recommending the revision clause later utilized in all conventions, stated that the Committee ". . . considered that the inclusion of this revision clause made unnecessary any clause on denunciation." [65] In what way the revision clause, which provides no assurance of results, obviates the necessity of a denunciation clause is somewhat difficult to understand, unless it can be interpreted as excluding any right of denunciation which might otherwise exist.

IV. LESSONS FOR THE FUTURE

A. *Alternative Approaches for Codification and Development*

In evaluating the Geneva Conferences on the Law of the Sea it is relevant to consider other possible approaches to codification and development of the law. Among the other approaches that might have been adopted are the following:

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[63] 2 OFFICIAL RECORDS 71–72.

[64] In this connection see Verzijl, *The United Nations Conference on the Law of the Sea, Geneva 1958—Part I,* 6 NETHERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 1, 4–5, 9–11 (1959).

[65] 2 OFFICIAL RECORDS 127.

1. Publication of International Law Commission drafts.
2. General Assembly resolutions adopting International Law Commission drafts or otherwise attempting to contribute to the codification and development of international law directly.
3. Publication of declarations or resolutions of a conference.
4. Bilateral agreements.

The approach suggested by the first alternative would clearly have saved a great deal of time, trouble and expense. However, the mere publication of a draft such as that prepared by the International Law Commission does not in and of itself affect the content of international law. The draft may carry some weight as an indication of agreed rules of customary law and with regard to aspects which require change it may point the way; but it has no immediate binding effects. The same may be said for the General Assembly resolutions adopting International Law Commission drafts or otherwise attempting to contribute to the codification and development of international law directly. The General Assembly resolution, particularly if carried by a large majority, may add weight to the International Law Commission draft, especially with regard to the question as to whether it properly reflects agreed customary law, but beyond this, generally speaking, it is not immediately effective. Similarly, publication of declarations or resolutions of a conference does not, in general, result in binding rules of international law. The declarations or resolutions may have some force, along the lines of General Assembly resolutions, as previously discussed; however, in the absence of agreement by the participants in a conference that they could be considered as bound by resolutions and declarations adopted at it, there can be no binding effect.

With regard to bilateral agreements, it may be said that their effect is binding to the same extent as multilateral conventions upon the parties to them, but their function in the codification or development of the law cannot be as extensive as that of conventions resulting from a conference with a large number of participants. In the first place, bilateral agreements cannot have the same effect as multilateral agreements in indicating general agreement as to what constitutes customary law. Second, because of the limits as to parties to them, they cannot normally have great significance in the development of the law. Finally, and most important, bilateral negotiations do not provide the same opportunities for the exchange of views and information, and for the harmonizing and compromising of positions, as do multilateral negotiations.

B. *Lessons for Conference Technique*

One possible improvement in conference technique would be to keep the experts who assisted in the preparation of the conference available, in a secretariat capacity, throughout the life of the conference. Pursuant to the General Assembly's resolution convening the 1958 Conference, the Secretary-General invited ten experts to assist in the preparation of the Conference.[66] However, at the Conference itself there were only three outside experts on the Secretariat staff—Professor J. P. A. François of the Netherlands, Dr. B. N. Chopra, former Fisheries Adviser to the Government of India, and Mr. M. B. Schaefer, Director of Investigations, Inter-American Tropical Tuna Commission, and Research Associate, Scripps Institute of Oceanography, University of California.[67] Presumably Dr. Chopra and Mr. Schaefer were requested to work with the Secretariat because of their technical expertise, leaving Professor François as the only staff member thoroughly familiar with the drafting and other juridical aspects of the Conference's work.

If, however, a nucleus of experts, highly qualified in drafting, who had assisted in the preparation of the Conference, had been retained throughout its duration, they might have been able to make a significant contribution to the Conference's work as a "special" steering and drafting committee, available to assist both the General Committee and the Drafting Committee in their work. If this procedure were followed, men who for some time had been familiar with the juridical problems of the law of the sea would have been engaged, throughout the Conference, in assisting —always subject to final authority of the official organs of the Conference itself—in the difficult work of drafting and coordinating.[68]

It might be suggested that a further improvement in conference technique would be to permit the Conference to adopt, by simple majority vote, declarations with regard to provisions not included in conventions because of failure to receive a two-thirds vote. Had such a procedure been authorized at the 1958 Geneva Conference, some provision providing a breadth for the territorial sea—perhaps the United States compromise proposal—would probably have been adopted as a declaration. The same, of course, is true as far as the 1960 Conference is concerned. However, whether such a procedure would actually constitute any improvement is questionable. A provision receiving only a bare majority of conference support would still be greatly in dispute and might not constitute a contribution to the clarification or settlement of the law. Furthermore, since a provision adopted only by majority vote would become the subject of a declaration but not of a convention, it would not have binding force.

One additional point which should be mentioned is the desirability of minimizing as far as possible the pressure of time upon a conference by insuring that the physical facilities needed will be available to it for as long as the conference can reasonably be expected to continue. Apparently it was necessary to conclude the 1958 Geneva Conference by April 27 because of demands on the conference space for other purposes. No doubt the necessity for members of delegations to return to their normal work constitutes a time-limiting factor, but a conference should not be faced with the requirement of vacating its site by a predetermined deadline.[69]

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[66] *Preparation of the Conference: Report of the Secretary-General,* 1 *id.* at 303–04.

[67] 2 *id.* at xxviii.

[68] At the 1960 Conference, Professor J. P. A. François of the Netherlands again served as an expert. (See biographical note on Professor François, United Nations Review, June 1960, page 13). However, it is not possible to ascertain from documents pertaining to the 1960 Conference available to the author whether other experts assisted in connection with this Conference.

C. *Conclusions as to the Adequacy of Present Machinery for Codifying and Developing International Law*

In view of the success of the 1958 Geneva Conference in adopting four conventions covering broad aspects of the law of the sea, it is clear that the present machinery for codifying and developing international law cannot be written off as defunct or unworkable. On the other hand, it is obvious that the present machinery is not perfect. The process is a slow one. The codification of the law of the sea may be said to have started in the years before the Hague Conference of 1930, and it is not yet complete. Furthermore, there are no assured means of revising conventional law to keep it abreast of current developments. The parties, or an international organization such as the General Assembly where given responsibilities in this regard, may or may not agree to the holding of a revision conference. Even though a revision conference may be held, its success is not assured. In addition, if the two-thirds vote rule is utilized, agreement may not be reached where there is a wide divergence of policies and views. Finally, international law, as embodied in conventions, is not fully binding on States unless they ratify the conventions. And even when ratified by the States, the conventions may be subject to a multitude of reservations.[70]

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[69] Commenting on the choice of site for the Geneva Conference on the Law of the Sea, D. H. N. Johnson has stated: "Under modern conditions the Secretary-General must frequently not only select the city in which the conferences are to be held but also fix their duration, so that they may be fitted into the entire programme of international conferences. On this basis the Secretary-General allotted nine weeks to the Conference on the Law of the Sea. While this was a generous period and more than twice as long as the duration of the Hague Conference of 1930, it cannot be regarded as entirely satisfactory that conferences on the codification and progressive development of international law—which meet very rarely—should be allotted in advance a fixed time in which to work. Moreover, this time limit necessarily depends on administrative considerations rather than on a serious estimate —even if it were possible to make such an estimate—of the period that will be needed in order to complete the work." Johnson, *The Preparation of the 1958 Geneva Conference on the Law of the Sea,* 8 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 122, 138 (1959). A discussion of the 1960 Geneva Conference and its failure to reach agreement on the breadth of the territorial sea by Professor J. P. A. François, who attended both the 1958 and 1960 Conferences as an expert, contains no comment to the effect that shortness of time was a factor in failure of this conference. François, *The Second International Conference on the Law of the Sea,* United Nations Review, June, 1960, pp. 12–14. Given the limited scope of the Conference, the six weeks utilized was probably sufficient.

[70] As of November 3, 1960, two states, Haiti and the United Kingdom, had ratified all four of the conventions adopted by the 1958 Conference. One state, Cambodia, which had not been a signatory of the conventions, had acceded to all four conventions. Afghanistan had ratified the Convention on the High Seas only. Letter from Reginald D. Bruce, Treaty

Yet the question remains whether any immediate prospect exists for improvement of a revolutionary nature. A true legislature, modeled on the lines of domestic parliaments, with full powers to reach conclusions and to enact them into law has its appeal, but at the moment seems beyond reach. For the present, what must be done is to make the existing system work as effectively as possible, at the same time encouraging the inner dynamics so that a more viable system may eventually emerge.

Section, Office of Legal Affairs, United Nations Secretariat, New York, to the author dated November 3, 1960.

ENFORCEMENT OF DELINQUENT PROPERTY TAXES IN NEW YORK

PART II

Edward S. Godfrey *

Summary of Part I.—Part I of this article † treated briefly certain municipal problems that have arisen, especially in periods of economic depression, from partial ineffectiveness of the administrative tax sale as a method for collecting property taxes. To provide a background for appraisal of relatively recent tax foreclosure legislation in New York, we began tracing the evolution of the administrative tax sale in this state from the early statutes of the nineteenth century. The prevalent attitude of the bar that a title derived solely through such a sale is unmarketable in practice, if not in legal theory, had its origin in the common law requirement that all procedures prescribed for the assessment, levy and collection of a property tax be followed strictly, as a condition to the validity of a tax title conveyed in the enforcement of the tax. Before 1850, one who claimed title through an administrative tax sale had the heavy burden of showing due performance of all official acts upon which the title depended. The provisions of the Revised Laws of 1813 and Revised Statutes of 1828, that the tax deed should be conclusive evidence that the sale was regular according to the provisions of the statute, were not construed as meaning that the comptroller's deed was conclusive evidence of the comptroller's power to sell. The conclusive presumption of regularity did not extend to proceedings leading up to the sale itself or to proceedings after sale necessary to bar the owner's privilege of redemption. The course of decisional law in the first half of the nineteenth century had the effect of rendering tax titles highly vulnerable to attack by the original owner or persons claiming under him. The legislature finally intervened in 1850 by enacting a provision that tax deeds should be presumptive evidence that the sale and all proceedings prior thereto, including assessment of the land, and all required redemption notices had been regular and in accordance with pertinent statutes.

In Parts II and III of this article, we shall continue our study of the evolution of the law relating to administrative tax sales, analyzing some of the difficulties that led to curative legislation in 1885, 1891 and 1893.

C. THE ADMINISTRATIVE TAX SALE IN NEW YORK AFTER 1850.

1. *Settlement of the Evidentiary Problem.*—In application, the statutory presumption of the regularity of proceedings prior to sale and of notices of redemption after sale was given the effect of shifting the evidentiary burden from the claimant under the tax deed to the claimant under the

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original title.[1] The courts respected the evident purpose of the statute[2] to relieve the holder of the tax title of the burden of showing affirmatively the performance by the numerous municipal officers concerned of all the duties requisite to the valid assessment, levy and collection of the tax or taxes upon which the tax title depended.[3] It is true that the court of appeals showed no disposition to make such legislation retroactive in effect by applying its policy in aid of tax deeds executed before the statute was enacted.[4] And where special laws other than the general tax statute governed the collection of taxes or improvement assessments in a particular municipality, if they did not contain an evidentiary presumption similar to that in the statute of 1850 and its successors, the strict common law rule was still applied.[5] But the main effect of the new provision was to ease the burden of holders of tax titles in adducing evidence to establish their titles.

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[1] Wood v. Knapp, 100 N.Y. 109, 2 N.E. 632 (1885); Brown v. Allen, 57 Hun 219, 10 N.Y. Supp. 714 (N.Y. Sup. Ct., Gen. Term 1890); Ostrander v. Darling, 53 Hun 190, 6 N.Y. Supp. 718 (N.Y. Sup. Ct., Gen. Term 1889). See ANNOTS., 30 A.L.R. 8 (1924), 88 A.L.R. 264 (1934).

The court of appeals showed no disposition to question the constitutional validity of the new statute. Hand v. Ballou, 12 N.Y. 541 (1855); *accord*, on the power of the legislature to shift the burden of proof with respect to the validity of a tax deed, People v. Turner, 117 N.Y. 227, 22 N.E. 1022 (1889).

[2] N.Y. Sess. Laws 1850, ch. 298, § 83, superseded by N.Y. Sess. Laws 1855, ch. 427, §§ 65, 92. For a discussion of that legislation, see Part I of this article, 24 ALBANY L. REV. 271, 312–13 (1960). The statute of 1855 was amended by N.Y. Sess. Laws 1860, ch. 209, by making it also apply retroactively to tax deeds theretofore executed, where the claimant under the tax title was in possession of the land described in the deed. This latter provision disappeared in legislation of 1885, 1891 and 1893, providing certain curative presumptions, to be discussed in detail in Part IV of this article. N.Y. Sess. Laws 1885, ch. 448, as amended by N.Y. Sess. Laws 1891, ch. 217, and as supplemented by N.Y. Sess. Laws 1893, ch. 711, §§ 11, 12. The legislation of 1855 still appears, in substance, in N.Y. Real Property Tax Law § 1020(3), which provides, in part: "Every such conveyance [*i.e.*, by the county treasurer pursuant to section 1018 of the N.Y. Real Property Tax Law] shall be presumptive evidence that the sale and all proceedings prior thereto from and including the assessment of lands sold, and that all notices required by law to be given previous to the expiration of the time allowed by law for the redemption thereof, were regular and in accordance with all the provisions of law relating thereto. . . ."

[3] See Wood v. Knapp, 100 N.Y. 109, 112, 2 N.E. 632, 633 (1885). Similar legislation in a number of other states was given the same effect. See BLACK, TAX TITLES § 454 (2d ed. 1893): ". . . [T]he original owner, or other person contesting the tax title, must lay his finger upon the precise point or points where he claims the proceedings to have been irregular or unauthorized, and must establish, by sufficient and satisfactory legal evidence, the illegality or fault which vitiates them. If he shall succeed in thus making out a prima facie case against the tax title, he will have shifted the burden of proof, in respect to the points so singled out for attack, back to the purchaser. The exact quantum of proof necessary to accomplish this . . . has not been fixed by the authorities." (Footnotes omitted.)

The treatment of presumptions in 2 COOLEY, TAXATION 922–26 (3d ed. 1903) must be understood to refer to common law presumptions, not those created by statute.

[4] Beekman v. Bigham, 5 N.Y. 366 (1851); see also Thompson v. Burhans, 61 N.Y. 52, 60 (1874) (dictum).

[5] Marsh v. City of Brooklyn, 59 N.Y. 280 (1874); Rathbone v. Hooney, 58 N.Y. 463 (1874); Westbrook v. Willey, 47 N.Y. 457 (1872) (dictum); *accord*, Brown v. Goodwin, 75 N.Y. 409 (1878), construing a federal property tax statute; see also Coffin v. City of Brooklyn, 116 N.Y. 159, 165, 22 N.E. 227, 229 (1889); Guest v. City of Brooklyn, 69 N.Y. 506, 514 (1877).

Litigation over tax titles and, more generally, over the validity of taxes and improvement assessments was extensive and complicated during the latter half of the nineteenth century.[6] That litigation was carried on against a backdrop of growing public dissatisfaction with the tax on personal property, which was becoming increasingly evaded by concealment or removal with a resulting heavier burden on real estate.[7] As a result of the preëmption by the federal government of more easily managed sources of revenue, such as duties and internal revenue taxes, New York, like other states, had been driven to the extension of its property tax.[8]

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[6] The general development of the law in this area is well summarized in the preface to the first edition of BLACK, TAX TITLES (1888), as follows:

> The amount of litigation in regard to tax titles has of late years largely increased; and at present this has become one of the most considerable—as it has always been one of the most intricate—branches of real property law. The courts have been called upon to examine and elucidate almost every conceivable question arising out of the nature, origin, and incidents of this species of conveyance. Some idea of the extent of their labors may be gathered from the fact that more than two thousand decisions are cited in this work. And further, the last half century has witnessed the most important and radical changes, introduced both through the action of legislative bodies and the interpretations of the judicial tribunals, in the law governing this subject. There was a period in the history of our jurisprudence when it had become proverbial that a tax title was no title at all; when the conveyance of lands to a tax purchaser came as near being a solemn mockery as it was possible for any transaction wearing the sanction of legal forms; and when the strictness of the laws and the severity of the courts combined to make the risking of one's money upon a tax title an experiment so hazardous that it would have been regarded as foolhardy, save for the smallness of the stakes. As for the animus of the courts, at this period, it is well seen in the following sentences, quoted from one of the reported cases: 'This court will not inquire into the conscience of the man whose morality will allow him to sleep quietly after appropriating to himself one hundred and sixty acres of valuable land for the pitiful sum of one dollar and eighty-four cents. It is sufficient to say that he cannot challenge any sympathy of this court.'
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> But this aspect of affairs was changed. The various states applied themselves to the task of rescuing their tax titles from the reproach into which they had fallen, of imparting greater security to the holders of such titles, and, at the same time, of giving increased facility and certainty to the working of their revenue systems. To this end, retrospective and prospective curative statutes were adopted, the rule of exact compliance with the statutory formulas was considerably relaxed, short statutes of limitation were enacted, and tax deeds were made presumptive evidence of title. But the legislative bodies were sometimes carried so far, in this work of reformation, that they were in danger of forgetting the other side—the necessity of protecting the tax payer from lawless deprivations of his property, and his security in his constitutional rights as a citizen. Then it became the duty of the courts to separate the legal from the illegal provisions, and to apply the salutary innovations, while guarding the rights of either party with equal hand.
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> Now it has been the design of the author, in the following pages, to construct, in the light of the statutes and decisions, a treatise on tax titles which should present an accurate view of the state of the law on this subject as it exists at the present moment; and it is his earnest hope that the result of his labors may prove to be of practical utility to the working lawyer in the office and the court-room. It would have been easy, from the amount of matter at hand, to extend the limits of this work far beyond the number of pages it now occupies. But economy of time and space is of the utmost importance to the busy practitioner; and the author feels confident that no one will blame him for terseness in the treatment. . . .

[7] See Lutz, *The State Tax Commission,* in 17 HARVARD ECONOMIC STUDIES 189–91 (1918); Schwab, *History of the New York Property Tax,* in 5 PUBLICATIONS OF THE AM. ECON. ASS'N 359, 444–61 (1890). Dr. Schwab's essay was an enlargement of his article entitled "Die Entwickelung der Vermögenssteuer im Staate New York," appearing in 3 ELSTER, STAATSWISSENSCHAFTLICHE STUDIEN 145 (Jena 1891).

[8] Schwab, *supra* note 7, at 424–25.

The settlement of the state was proceeding rapidly, with the result that nonresident ownership of unoccupied land was becoming less common than it had been earlier. As a result, local assessors functioned under constant political pressure to assess the real estate of local residents at less than the full value prescribed by statute.[9] The rapid growth of the metropolitan area of New York City, resulting in frequent assessments for utility lines and street improvements,[10] coupled with the failure of officials there to follow statutory procedures accurately, overburdened the system, cumbersome at best, to the point where enormous arrearages of unpaid invalid taxes, improvement assessments and water rates sometimes accumulated and special legislation became necessary to avoid fiscal collapse.[11] The tensions created by these diverse social forces were reflected in a large volume of bitterly contested litigation in which the courts played quite consciously the role of striving to insure that municipal officials stayed within reasonable bounds in carrying out the complex processes required for raising the principal source of local revenues.[12]

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[9] For a history of the early efforts in New York to curb or regulate chronic undervaluation, see Lutz, *supra* note 7, at 57–66. There has been some evidence that the tendency of assessors to undervalue is strengthened by the very county equalization procedure designed to regulate it. See REPORT OF N. Y. STATE COMMISSION FOR REVISION OF THE TAX LAWS, LEG. DOC. NO. 77 (1932), MEMORANDUM NO. 3, ASSESSMENT AND EQUALIZATION OF REAL ESTATE FOR TAXATION IN NEW YORK, at 45. The prospect of an increase by county equalization tends to cause town assessors to place value so low that, even if increased by equalization, the town may still escape some of its fair share of the tax burden. For a recent analysis of valuation methods, with suggestions for improvement, see Comment, *Tax Assessments of Real Property—A Proposal for Legislative Reform,* 68 YALE L.J. 335 (1958).

[10] An improvement assessment is not a "tax" for all purposes in the law, Buffalo City Cemetery v. City of Buffalo, 46 N.Y. 506 (1871), being a special imposition made for a particular improvement supposed especially to enhance the value of the assessed land, as distinguished from a general money tax. See In the Matter of Van Antwerp, 56 N.Y. 261, 267 (1874). But an unpaid improvement assessment, duly levied in accordance with the provisions of a city charter or other special legislation, is usually made a lien on the benefited land by a provision of the controlling statute, and the collection of a delinquent assessment is ordinarily enforceable by the same procedures as are applicable to a delinquent tax. The municipal legislative body is usually authorized to provide for payment of an improvement assessment in installments, and to include the amount of unpaid installments, with interest, in the next general tax levied on the realty. For pertinent provisions of laws of general application, see N.Y. COUNTY LAW § 828 (certain counties only); N.Y. GEN. CITY LAW § 20(11); N.Y. GEN. MUNICIPAL LAW §§ 120-g, 120-i, 120-m (sewers); N.Y. SECOND CLASS CITIES LAW § 92 (sidewalk repairs), § 100 (apportionment of street and sewer costs), § 124 (paving of streets); N.Y. TOWN LAW §§ 202, 202-a (district and special improvements), art. 15 (financing of public improvements); N.Y. VILLAGE LAW § 113 (lien of assessment for local improvements). Since both taxes and improvement assessments are ultimately enforced by the same procedure of administrative sale of the realty affected, they will be treated indiscriminately in this article except where peculiar features of the improvement assessment may call for differentiation. It should be noted that the word "assessment" in the New York Real Property Tax Law has reference to a determination of the valuation of real property and whether it is subject to taxation or special ad valorem levies, rather than to the amount of the tax itself. N.Y. REAL PROPERTY TAX LAW § 102(2). An assessment for an improvement, on the other hand, denotes a determination of the amount that the landowner is obliged to pay as his share of the cost of the improvement.

[11] See, *e.g.*, N.Y. Sess. Laws 1883, ch. 114, concerning the settlement and collection of arrearages of unpaid taxes, assessments and water rates in the city of Brooklyn. In Lamb v. Connolly, 122 N.Y. 531, 25 N.E. 1042 (1890), the court, per Bradley, J., observed that the arrearages affected by that statute had accumulated in an amount exceeding ten million dollars. *Id.* at 533, 25 N.E. at 1042.

The presumptive-evidence provision of the statute of 1850 and its successors [13] left it open to the original owner of land sold for taxes, or one claiming under him, to prove by a fair preponderance of the evidence that the proceedings leading up to the tax sale had been fatally defective or that the required redemption notices had not been duly given.[14] What constituted sufficient evidence to overcome the statutory presumption was elaborated in a group of cases, beginning with a decision in 1872 that the statutory presumption of due publication of a comptroller's redemption notice could be overcome by producing old newspapers printed for several months before the beginning of the last six months for the time to redeem and showing that they did not contain such a notice.[15] In 1873, in an action by the holder under a tax deed, who was not in actual possession, against a trespassing stranger to replevy logs taken by the stranger from the land described in the tax deed, the trespasser defended successfully on the ground that the tax title was invalid because the assessment rolls on which the original tax was extended had been unverified.[16] A directed verdict for the defendant trespasser was sustained, based on rather indirect evidence, which the court thought sufficiently persuasive, that certain rolls for 1852, 1853 and 1854, which appeared from not wholly conclusive proof to have been the rolls on which the supervisors had acted, bore no affidavit of the assessors. The court of appeals thought that a jury verdict for the plaintiff could not have been supported, though two of the original assessors testified that they thought they had sworn to the rolls of those years but could not be sure.[17]

That there was a limit to which such negative evidence would be permitted to overcome the statutory presumption of regularity appeared from *Colman v. Shattuck*, decided in 1875.[18] There the presumption was held not overcome where the party attacking the tax title tried to show that a certain tax notice had not been posted years before, by having the official responsible for the posting testify that he had no recollection of doing so and by giving evidence that thorough searches had been made unsuccessfully in the appropriate town offices for notices and proof of posting.[19] The court of appeals was impressed with the long period, seventeen years, that had elapsed between the laying of the tax and the trial of the action and held that without affirmative testimony to establish the alleged defect, a finding of irregularity would have been unauthorized.[20] That approach, which was certainly faithful to the main purpose of the legislation creating the presumption of regularity, has been followed in those decisions of the lower courts of New York in which the issue has been merely the quantum of proof necessary to overcome the statutory presumption.[21]

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[12] See, *e.g.*, Van Rensselaer v. Witbeck, 7 N.Y. 517, 521–22 (1852); Guest v. City of Brooklyn, 69 N.Y. 506, 515–18 (1877).

[13] See statutes cited note 2 *supra*.

[14] Whitney v. Thomas, 23 N.Y. 281 (1861). In Johnson v. Elwood, 53 N.Y. 431 (1873), *modified*, 56 N.Y. 614 (1874), a complete stranger to the title successfully asserted invalidity of the tax title, where the tax grantee had never gone into actual possession, as a defense to an action by the tax grantee to recover possession of logs cut on the premises and removed therefrom. *Accord*, Thomas v. Burhans, 61 N.Y. 52 (1874) (dictum). In Dever v. Hagerty, 169 N.Y. 481, 62 N.E. 586 (1902), the tax grantee went into possession. While the land was thus held adversely to the original owner, the latter conveyed to a stranger. Then the original owner quitclaimed to the tax grantee. In ejectment by the stranger against the tax grantee, it was held that the stranger could not avail himself of defects in the tax title since his own deed from the original owner was void under the statute, then in effect, prohibiting champertous conveyances. At most, he held only a right of entry, Hamilton v. Wright, 37 N.Y. 502 (1868), which was lost upon his grantor's quitclaiming to the adverse possessor. Thus, the court of appeals did not reach the question of the validity of the tax deed.

[15] Westbrook v. Willey, 47 N.Y. 457 (1872).

[16] Johnson v. Elwood, 53 N.Y. 431 (1873).

[17] *Id.* at 436.

[18] 62 N.Y. 348 (1875).

A more serious threat to the validity of tax titles came from irregularities the occurrence of which could be established by affirmative evidence overcoming the presumption of regularity. The decisions after 1850 made it clear that the purchase of tax titles remained a hazardous business because of the possibility of provable official error in assessment, levy, collection, or giving of notice of sale or redemption. Dominated by a strong wish to protect property owners against illegal tax proceedings but increasingly aware that too high a standard for the conduct of minor local officials would make the property tax unworkable, the court of appeals struggled to elaborate a theory for distinguishing between fatal and non-fatal errors in administration of the tax. Since the categories outlined by the judicial decisions during that period are still important, they will be treated in some detail below. However, the basic difficulty was one that could not be resolved by the courts alone; namely, the fact that an unnoticed error, perhaps substantial enough when made, could be established many years later to overthrow a tax title purchased without knowledge of the mistake. The ordinary statute of limitations governing actions for the recovery of possession of real property required too long a period of adverse possession for the adequate protection of tax titles. Again the legislature had to intervene, this time with a statute that combined provisions purporting to validate certain outstanding tax certificates and conveyances relating to lands of nonresidents with provisions for limiting the time within which *any* tax certificate or conveyance could be attacked for irregularity.[22] That statute, enacted in 1885 so as to be applicable only within fifteen counties in the forest preserve, was amended in 1891 to apply to all counties except two.[23] We shall see that the judicial construction of that legislation was influenced by rules elaborated in earlier cases many of which had not involved directly the validity of tax titles.

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[19] Several other points in the *Colman* case were resolved in favor of the tax grantee, on many of which an adverse decision could have been easily supported with precedent. For example, only two of the three assessors verified the roll, and no certificate to that effect was attached, giving the name of the delinquent assessor and the cause of the omission. The statutory provision apparently requiring such certificate was not a necessary part of the roll, said the court. Also, the fact that the two assessors entered their certificate in the middle of the roll, before the nonresident list, instead of at the end, did not invalidate the assessment. Errors of three cents and four cents in the returns of the collector were held to be *de minimis.* It was also held that the provision that redemption notices must be published by the comptroller "for the space of ten weeks prior to the commencement of the sale" did not require that such publication be made for the prescribed time *immediately* prior to the sale. All in all, the *Colman* decision may be fairly cited for the proposition that the court of appeals did not invariably approach the administration of the property tax with a hypercritical attitude toward the irregularities of tax officials. It is to be contrasted with the questionable ruling in the connected case of Shattuck v. Bascom, 105 N.Y. 39, 12 N.E. 283 (1887), that an error, probably inadvertent, in the assessors' oath invalidated a tax sale and the deed given under it.

[20] 62 N.Y. at 358–59.

[21] Lancaster Sea Beach Improvement Co. v. City of New York, 161 App. Div. 469, 146 N.Y. Supp. 734 (1914), *aff'd,* 214 N.Y. 1, 108 N.E. 90 (1915); People *ex rel.* Wright v. Chapin, 38 Hun 272 (N.Y. Sup. Ct., Gen. Term 1885); Chamberlain v. Taylor, 36 Hun 24 (N.Y. Sup. Ct., Gen. Term 1885), *aff'd,* 105 N.Y. 185, 11 N.E. 625 (1887). *But see* White v. Hill, 100 App. Div. 207, 91 N.Y. Supp. 623 (1905).

2. *The Distinction Between Mandatory and Directive Provisions.*—Judicial application of the property tax statutes between 1850 and 1885 involved chiefly two kinds of problems, which turned out to be interrelated: (1) how to make and apply a rational classification of defects in tax proceedings into those that were fatal and those that were not, in order that property taxation might not fail because of trivial administrative errors; and, (2) what remedies to permit to the citizen against whom a property tax was about to be, or already had been, improperly assessed, levied or collected or whose continued ownership seemed threatened by an outstanding defective tax title or tax lien. From the voluminous litigation and legislation by which those problems were gradually resolved, we shall select principally the elements that have remained permanently influential in the law of tax titles.

Interspersed among cases directly involving the validity of tax deeds were many cases in which taxpayers sought relief directly against municipal officers from assessments and levies claimed to be invalid for a great variety of reasons. In litigation directly between taxpayer and tax officials, the presumptions supplied by the statutes of 1850 and 1855 had little influence.[24] The court of appeals of New York, like other courts throughout the country, showed for many years a strong tendency to favor the taxpayer, adopting the view that the adequate protection of private property required a substantial adherence by assessors, supervisors, collectors and other officials to the procedures prescribed by the tax statutes.[25] In direct litigation between taxpayer and municipal officers, taxes have been erroneously or illegally levied, assessed or collected in a great variety of situations. Abundant opportunities for challenge were, and still are, afforded by possibilities that a tax is unconstitutionally exacted,[26] that it is levied for a purpose not authorized by constitution or statute[27] or includes unauthorized items,[28] that the property taxed is not geographically within the jurisdiction of the taxing authority,[29] that the levy is made without a proper preliminary resolution, properly advertised, of the municipal authorities,[30] that the assessors are not properly qualified,[31] that the property taxed is not correctly or sufficiently described on the assessment rolls[32] or is assessed to the wrong person,[33] that the valuation of the property is excessive or discriminatory or has been reached by applying the wrong rules,[34] or that the assessment roll has been altered after being completed and opened for inspection.[35] Before the abolition of the tax on personal property of residents, disputes arose over the residency or nonresidency of the taxpayer,[36] over the classification of property of nonresidents as real or personal,[37] and over the proper measure of deductible debts that could be set off against the amount of a resident taxpayer's assessable personal property.[38] Litigation has arisen from time to time over the validity of collectors' warrants.[39] A major area of controversy has been that associated with the processes of tax sale and redemption, especially the time,[40] place[41] and conduct of sale[42] and the notice and advertisement preliminary thereto,[43] and the timeliness of attempted redemption.[44]

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[22] N.Y. Sess. Laws 1885, ch. 448.

[23] N.Y. Sess. Laws 1891, ch. 217. The excepted counties were Chautauqua and Cattaraugus. By virtue of N.Y. Sess. Laws 1893, ch. 711, §§ 11, 12, a comptroller's tax deed of lands within the forest preserve entitled the holder to certain presumptions of regularity that were separate from, and additional to, those afforded by the statutes of 1885 and 1891.

[24] They were in terms limited to the evidentiary effect of certificates and conveyances of the comptroller, county judge or county treasurer, as the case might be. See statutes cited note 2 *supra*.

[25] For a summarization of the prevailing judicial attitudes, see 2 COOLEY, TAXATION 911–15 (3d ed. 1903).

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[26] See, *e.g.*, Weismer v. Village of Douglas, 64 N.Y. 91 (1876); Hopkins v. Board of Supervisors, 52 N.Y. 556 (1873); see generally 1 COOLEY, *supra* note 25, ch. 3.

[27] See, *e.g.*, Matter of Jensen, 28 Misc. 378, 59 N.Y. Supp. 653 (Sup. Ct. 1899), *aff'd*, 44 App. Div. 509, 60 N.Y. Supp. 933; People *ex rel.* Morris v. Edmonds, 15 Barb. 529 (N.Y. Sup. Ct. 1853). See generally 1 COOLEY, *supra* note 25, ch. 4.

[28] See, *e.g.*, Parish v. Golden, 35 N.Y. 462 (1866).

[29] See, *e.g.*, Dorn v. Backer, 61 N.Y. 261 (1874) (real property); In the Matter of Nichols, 54 N.Y. 62 (1873) (personal property); 1 COOLEY, *op. cit. supra* note 25, at 86–94, 641–59.

[30] See, *e.g.*, In the Matter of Phillips, 60 N.Y. 16 (1875); In the Matter of Astor, 50 N.Y. 363 (1872); *In re* Douglass, 46 N.Y. 42 (1871).

[31] See, *e.g.*, People *ex rel.* D. & H. Canal Co. v. Parker, 117 N.Y. 86, 22 N.E. 752 (1889); Merritt v. Village of Portchester, 71 N.Y. 309 (1877).

[32] See, *e.g.*, Cruger v. Dougherty, 43 N.Y. 107 (1870).

[33] See, *e.g.*, Ritter v. Worth, 58 N.Y. 627 (1874).

[34] See, *e.g.*, Williams v. Weaver, 75 N.Y. 30 (1878), *aff'd*, 100 U.S. 547 (1879).

[35] See, *e.g.*, People *ex rel.* Chamberlain v. Forrest, 96 N.Y. 544 (1884); Overing v. Foote, 65 N.Y. 263 (1875); Clark v. Norton, 49 N.Y. 243 (1872).

[36] See, *e.g.*, In the Matter of Nichols, 54 N.Y. 62 (1873); Mygatt v. Washburn, 15 N.Y. 316 (1857).

[37] See, *e.g.*, Trustees of Village of Elmira v. Dunn, 22 Barb. 402 (N.Y. Sup. Ct., Gen. Term, 1856).

[38] See, *e.g.*, People *ex rel.* Osgood v. Commissioners, 99 N.Y. 154, 1 N.E. 401 (1885).

[39] See, *e.g.*, Brase v. Miller, 195 N.Y. 204, 88 N.E. 369 (1909); Bank of Chenango v. Brown, 26 N.Y. 467 (1863); Sheldon v. Van Buskirk, 2 N.Y. 473 (1849).

[40] See, *e.g.*, Colman v. Shattuck, 62 N.Y. 348 (1875); Dubois v. City of Poughkeepsie, 22 Hun 117 (N.Y. Sup. Ct., Gen. Term 1880).

[41] See, *e.g.*, People *ex rel.* Supervisors of Richmond County v. Hopkins, 2 Thomp. & C., 586 (N.Y. Sup. Ct., Gen. Term 1874).

[42] See, *e.g.*, Fellows v. Denniston, 23 N.Y. 420 (1861), *rev'd sub nom.* The New York Indians, 72 U.S. (5 Wall.) 761 (1866); Andrus v. Wheeler, 22 App. Div. 596, 48 N.Y. Supp. 118 (1897); People v. Golding, 55 Misc. 425, 106 N.Y. Supp. 821 (Sup. Ct. 1907).

Faced with such a multitude of possibilities of provable official error in the collection of municipal revenues, the courts of the mid-nineteenth century worked out a classification of statutory provisions as "mandatory" or "directive." Officials participating in the taxing process had to comply with "mandatory" provisions of the pertinent statutes under pain of having a tax adjudged invalidly assessed, levied or collected.[45] It was thought that the effect of a failure to comply with a mandatory provision of the tax law was to invalidate all subsequent steps taken in the taxing process on the ground that the officials taking such steps lacked jurisdiction to do so. Compliance with each mandatory provision was deemed a condition precedent to the valid performance of later steps in the sequence of processes.[46] For example, since the assessors' verification of the assessment roll is regarded as a mandatory requirement, in the absence of such verification the county board of supervisors has no jurisdiction to levy.[47] Or, since the provision for newspaper advertising of a sale for taxes is regarded as mandatory, noncompliance deprives the county treasurer—or, formerly, the comptroller—of jurisdiction to sell.[48] But where officials failed to follow directions judicially classified as merely "directive", their errors were deemed not fatal to the tax;[49] thus, a failure to include the dollar signs on the amounts set forth in the assessment roll has been held not fatal to the validity of the tax;[50] or a failure of one of three designated assessors to verify the roll where his two fellow assessors had verified it;[51] or a delay by the assessors in affixing their oath to the roll until after the delivery of the roll to the supervisors.[52]

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[43] See, *e.g.*, Kane v. City of Brooklyn, 114 N.Y. 586, 21 N.E. 1053 (1889).

[44] See, *e.g.*, Halsted v. Silberstein, 196 N.Y. 1, 89 N.E. 443 (1909). See generally 2 COOLEY, TAXATION 1052–53 (3d ed. 1903).

[45] See 1 COOLEY, TAXATION 476–87 (3d ed. 1903).

[46] 1 *id.* at 476–77.

[47] People v. Inman, 197 N.Y. 200, 90 N.E. 438 (1910) (alternative holding); Shattuck v. Bascom, 105 N.Y. 39, 12 N.E. 283 (1887); Brevoort v. City of Brooklyn, 89 N.Y. 128 (1882); Johnson v. Elwood, 53 N.Y. 431 (1873); Westfall v. Preston, 49 N.Y. 349 (1872); Van Rensselaer v. Witbeck, 7 N.Y. 517 (1852); People v. Pulver, 226 App. Div. 416, 235 N.Y. Supp. 655 (1929); see also People *ex rel.* Gillies v. Suffern, 68 N.Y. 321 (1877); *cf.* People *ex rel.* Rome, W. & O. R.R. v. Jones, 106 N.Y. 330, 12 N.E. 711 (1887); McMahon v. Palmer, 102 N.Y. 176, 6 N.E. 400 (1886); Colman v. Shattuck, 62 N.Y. 348 (1875); Parish v. Golden, 35 N.Y. 462 (1866); Dells, Inc. v. Ossman, 15 Misc. 2d 237, 184 N.Y.S.2d 884 (Sup. Ct. 1958); Hoen v. Suffolk County, 146 Misc. 489, 261 N.Y. Supp. 535 (Sup. Ct. 1932).

[48] The county treasurer (formerly the comptroller), at the prescribed time for the commencement of tax sale proceedings in his county, must cause a notice of tax sale to be published at least once in each week for six weeks in two newspapers "designated for the publication of the concurrent resolutions," specifying a day at the expiration of the six weeks on which the sale will commence at the county courthouse. N.Y. REAL PROPERTY TAX LAW § 1002(1). The contents of such notice are prescribed in N.Y. Real Property Tax Law § 1002(2) and must be substantially complied with. Clason v. Baldwin, 152 N.Y. 204, 46 N.E. 322 (1897). Mandamus will lie, in an appropriate case, to compel the county treasurer to advertise delinquent lands for sale. People *ex rel.* Carman v. Lewis, 102 App. Div. 408, 92 N.Y. Supp. 642 (1905). Notice of a sale for taxes by the county treasurer may be published in a supplement to the official newspaper instead of in the body thereof. Morton v. Horton, 189 N.Y. 398, 82 N.E. 429 (1907). On the timing of publication relative to date of sale, see Eller v. Loch Sheldrake Improvement Corp., 194 Misc. 542, 87 N.Y.S.2d 301 (1948). Publication in a newspaper that has not been officially designated for the purpose is invalid. In the Matter of Astor, 50 N.Y. 363 (1872).

Generally speaking, the characterization of statutory provisions as mandatory on the one hand or directive on the other depended upon whether the performance of the official acts involved was or was not deemed to be "designed for the security" of the taxpayer.[53] Although the New York Court of Appeals sometimes suggested that taxation would be not deemed invalid where statutory provisions were "substantially" complied with,[54] in application, that principle was not applied to sustain a tax where a statutory provision thought to be designed for the taxpayer's protection had been disobeyed by the municipal authorities even though the provisions might seem at first glance to be of a relatively minor nature and no detrimental reliance by the taxpayer upon the official action taken could be shown.[55] The only exception that seems to have been made to that approach occurred in a decision holding an error of three or four cents in the computation of a tax to be *de minimis*.[56]

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[49] See 1 COOLEY, TAXATION 486–91 (3d ed. 1903).

[50] Ensign v. Barse, 107 N.Y. 329, 14 N.E. 400 (1887); Chamberlain v. Taylor, 36 Hun 24 (Sup. Ct., Gen. Term), *aff'd,* 105 N.Y. 185, 11 N.E. 625 (1887); American Tool Co. v. Smith, 32 Hun 121 (Sup. Ct., Gen. Term), *aff'd,* 96 N.Y. 670 (1884). A similar rule applies to the omission of dollar signs before the figures in the columns of the roll for total value and tax, where the tax has been extended. Jones v. Chamberlin, 36 Hun 637 (Sup. Ct., Gen. Term), *aff'd sub nom.* Jones v. Chamberlain, 109 N.Y. 100, 16 N.E. 72 (1888).

[51] Colman v. Shattuck, 62 N.Y. 348 (1875), apparently disregarding a contrary dictum of Commissioner Reynolds, concurring in Bellinger v. Gray, 51 N.Y. 610, 620 (1873).

[52] People *ex rel.* Rome, W. & O. R.R. v. Jones, 106 N.Y. 330, 12 N.E. 711 (1887). Likewise, a provision for filing the completed and verified assessment roll with the town clerk on a specified date has been held merely directory. People *ex rel.* Rome, W. & O. R.R. v. Haupt, 104 N.Y. 377, 10 N.E. 871 (1887). A similar rule has been applied to a provision specifying the time for delivery of the supervisors' warrant, with copy of the tax roll annexed, to the tax collector. Bradley v. Ward, 58 N.Y. 401 (1874). The fact that the amount of the tax has been entered in the wrong column of the tax roll is not fatal to the validity of the tax. Lancaster Sea Beach Improvement Co. v. City of New York, 214 N.Y. 1, 108 N.E. 90 (1915).

[53] See Cruger v. Dougherty, 43 N.Y. 107, 121 (1870): "It is a rule well established by authority, that when one claims to hold another's property under statutory proceedings, as under a sale for taxes, he must show that every material provision designed for the security of the persons taxed, for their protection, has been substantially complied with, otherwise the claim will fail." The test announced in the *Cruger* case was a partial borrowing from Chief Justice Shaw's opinion in Torrey v. Millbury, 38 Mass. (21 Pick.) 64, 67 (1838): "One rule is very plain and well settled, that all those measures, which are intended for the security of the citizen, for ensuring an equality of taxation, and to enable every one to know, with reasonable certainty, for what polls and for what real and personal estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent, and if they are not observed he is not legally taxed, and he may resist it in any of the modes authorized by law for contesting the validity of the tax."

[54] See, *e.g.*, Sorchan v. City of Brooklyn, 62 N.Y. 339 (1875), holding that a special provision requiring a certificate by the board of assessors, of their estimate of the cost of a certain street improvement, was substantially complied with by their passing a resolution specifying the amount estimated. The common council thereafter levied the assessment in the amount stated in the assessors' resolution. The court said that the resolution was a substantial compliance with the act and was equivalent to a certificate. *Id.* at 342.

To judge from the large number of cases that have turned on the distinction, the classification of statutory provisions into mandatory and directive does not seem to have been too easily applied by private counsel. As Judge Cooley observed in his classic treatise on taxation, all the provisions of a statute that are not in terms merely permissive are designed to be obeyed or they would not have been enacted in the first place.[57] When the negligence or mistakes of municipal officers have resulted in disobedience of the terms of the statute, it becomes difficult in a complicated body of law of this sort to determine whether the taxpayer has been deprived of some element of protection as a result. In the early determinations of such a question in cases of first instance, the predilections of the judges were bound to be influential. Some of the early opinions reflect a degree of tolerant appreciation of the practical difficulties faced by underpaid, understaffed local officials in administering a complex body of legislation requiring the performance of onerous and unpopular duties.[58] But other opinions adopt a sterner tone. In 1875, the commission of appeals, per Reynolds, C., expressed its view of the situation as follows:

> The proceedings of town assessors are of the greatest consequence to every tax-payer of the State, and they are defined by statute with reasonable precision in most particulars at least. That their duties have been fearfully abused or violated, either by ignorance or design, is a fact known

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[55] See Cruger v. Dougherty, 43 N.Y. 107 (1870), holding an assessment void on the ground of inadequacy of description despite the fact that the taxpayer had paid taxes on the same property, similarly assessed, for several prior years. It is impossible to make hard-and-fast classifications of statutory provisions with respect to whether they should be regarded as mandatory or directive. For example, compare the following three applications of the "rule" that a valid warrant is a condition precedent to each compulsory step in the collection process: Sheldon v. Van Buskirk, 2 N.Y. 473 (1849), upheld a collector's warrant, issued by the county board of supervisors but signed by them individually without any designation of their official capacity; it was said that the collector might justify his collections under such a warrant without proving that the signatories were actually the supervisors. Likewise, a tax warrant signed by only four of five trustees of a village was held sufficiently executed where the issuance of the warrant had been authorized by vote of a quorum of the trustees at a regular meeting duly convened. Bank of Chenango v. Brown, 26 N.Y. 467 (1863). But in Brase v. Miller, 195 N.Y. 204, 88 N.E. 369 (1909), it was held that a failure by the board of supervisors to affix the seal of the county, as prescribed by statute, was fatal to the validity of the tax although the board had duly levied the tax and the seal of the board itself had been affixed to the warrant. The requirement of a county seal was held to be mandatory, not directive.

[56] Colman v. Shattuck, 62 N.Y. 348 (1875). *But cf.* In the Matter of Deering, 93 N.Y. 361 (1883), refusing to apply the rule of *de minimis* to an error of $7.01 in an improvement assessment of $246.95; see also Clason v. Baldwin, 152 N.Y. 204, 210, 46 N.E. 322, 323–24 (1897), questioning the validity of a comptroller's sale for sixty-three cents more than the amount of the tax.

[57] 1 COOLEY, TAXATION 476 (3d ed. 1903).

[58] See Overing v. Foote, 43 N.Y. 290, 297 (1871); Parish v. Golden, 35 N.Y. 462, 464 (1866); Barhyte v. Shepherd, 35 N.Y. 238, 245 (1866).

> and acknowledged by every intelligent citizen of the State, and such things have been ordinarily done with comparative immunity, so far as any relief is to be had in the courts.[59]

The difficulties that beset both private and municipal counsel in trying to predict results in this area may be illustrated by a brief examination of the principal cases involving the effect of noncompliance by the assessors with the statutory form of certificate or oath to be subscribed by the assessors on the assessment roll. In 1852, in *Van Rensselaer v. Witbeck,*[60] a collector of taxes was held personally liable for having enforced the collection of a tax under a warrant from the board of supervisors to which was attached a copy of the assessment roll bearing a certificate of the assessors that they had, among other things, estimated the value of the real estate "at the sums which a majority of the assessors *have decided to be proper . . . according to the usual way of assessing.*" That certificate was declared not to comply with the statutory form of certificate which then required the assessors to evaluate at "the true value," estimated according to their best information and belief. The court of appeals seems to have regarded the deliberate departure of the assessors from the statutory form in making their oath as if it were a small-scale rebellion—as indeed it was. The court pronounced the entire levy void and held the unfortunate collector who relied on the supervisors' warrant and annexed assessment roll personally liable for the tax collected under them.

Fourteen years later, in *Parish v. Golden,*[61] another assessors' certificate not complying with the statutory form came before the high court. This time the assessor had omitted, probably by mistake, several words specified in the statutory form, but, though the omitted words were of some significance, the element of deliberate revolt was lacking. With due attention to the practical consequences of nullifying assessment rolls, the court decided that the omission was a mere irregularity and observed that the *Witbeck* case should not be extended. After affording to the assessors the "usual presumption as to public officers," that they have done their duty,[62] the court placed its decision on the broad ground that the omission of even a material statement in the certificate should not be regarded as fatal to the assessment roll. The certificate is "like an informal verification in judicial proceedings," subject to correction and amendment.[63] The duty of verifying the assessment was "to be regarded as directory rather than jurisdictional." [64]

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[59] Overing v. Foote, 65 N.Y. 263, 269 (1875). See also the denunciation of injustices in special assessments by Church, C.J., in Guest v. City of Brooklyn, 69 N.Y. 506, 517 (1877).

[60] Van Rensselaer v. Witbeck, 7 N.Y. 517 (1852). This decision seems to have been reached in an effort to curb chronic underassessment. If so, it failed to accomplish its purpose. See N.Y. STATE COMMISSION FOR REVISION OF THE TAX LAWS, *supra* note 9, MEMORANDUM No. 3 at 45. Real property has remained generally underassessed, assessors simply conforming their certificates to the statutory language. In effect, the assessors in the *Witbeck* case were penalized for their candor in deviating openly from the statutory requirement of assessing at the true value. The modern statute requires that the assessment be verified as being made "at the sums which we have decided to be the full value thereof." N.Y. REAL PROPERTY TAX LAW, § 514. See Comment, *Tax Assessments of Real Property—A Proposal for Legislative Reform,* 68 YALE L.J. 335, 339 (1958). For treatment of special problems of valuation in property assessment, see ANNOTS. 24 A.L.R. 649 (1923); 95 A.L.R. 442 (1935); 104 A.L.R. 790 (1936); 108 A.L.R. 829 (1937).

[61] 35 N.Y. 462 (1866) (Hunt and Peckham, JJ., dissenting).

[62] *Id.* at 465.

After applying the *Parish* rule of substantial compliance once more to sustain a levy based upon a defective assessors' oath,[65] the court of appeals reverted in 1872 to the stricter view in deciding *Westfall v. Preston,*[66] holding void a verification of the roll made before time for its final completion.[67] The old *Witbeck* case was declared to have expressed "salutary doctrines" that could not be disregarded "without encouraging a laxity in the discharge of official duty and endangering the rights of the citizen." [68] In a case decided in 1873, it was said, *obiter,* that a roll would be fatally defective if unverified by one of the assessors and not accompanied by a certificate of the other assessors stating the cause of the omission.[69] Only two years later, *Colman v. Shattuck* [70] sustained an assessment and the consequent tax deed where not only had the roll been unverified by one of the assessors without explanation, but the entire non-resident part of the roll followed, instead of preceding, the assessors' verification. The oath also contained no venue. The court in *Colman* observed that the earlier pronouncement on the effect of unexplained failure by one of the assessors to verify the roll had been mere dictum. But in 1877 the strict rule was again applied where, under a local statute governing improvement assessments, the assessment commissioners were required to take an oath "faithfully and fully to discharge" their duties before acting and each had sworn merely that he would perform his duties "to the best of his ability." The oath was held fatally defective and the entire proceeding illegal.[71]

In *Brevoort v. City of Brooklyn,*[72] an omission in the assessors' oath to state, as required by the applicable statute, that the assessors had together personally examined within the year past, each and every lot or parcel of land or other assessable property within their district, rendered void the entire assessment and tax sales made under it. The accommodating views expressed in *Parish v. Golden* were rejected; *Colman v. Shattuck* was ignored. The *Brevoort* case resembled the old *Witbeck* case, of course, in that the assessors were rather obviously trying to make their oath conform to their actual practice, which was not in accord with the statutory mandate. Incidentally, the effect of the *Brevoort* decision was to invalidate taxes and assessments theretofore imposed upon real estate in the city of Brooklyn after 1861 and sales made to enforce such taxes and assessments, since the defective form of oath had apparently been used for a long time throughout the city.[73] The New York legislature and courts struggled for years with the consequences.[74]

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[63] 35 N.Y. at 466.

[64] *Id.* at 467.

[65] Buffalo & S.L. R.R. v. Board of Supervisors, 48 N.Y. 93 (1871).

[66] 49 N.Y. 349 (1872). Compare Bradley v. Ward, 58 N.Y. 401 (1874), holding that a town tax collector is protected by the supervisors' warrant with a copy of the assessment roll annexed and that the warrant is not void on its face merely because the assessors' affidavit does not appear on the copy of the roll so annexed.

[67] The vice of such a premature verification lies in its implication that the assessment roll has been finally completed, and is thus ready as a basis for further action in the taxing process, before taxpayers have had a full opportunity to challenge their assessments. See N.Y. REAL PROPERTY TAX LAW §§ 506, 508, 510, 512, 514, 516, 700, 702, 704, 804, 808, 900.

[68] 49 N.Y. at 355.

[69] Reynolds, C., concurring in Bellinger v. Gray, 51 N.Y. 610, 620 (1873).

[70] 62 N.Y. 348 (1875).

[71] Merritt v. Village of Portchester, 71 N.Y. 309 (1877); *cf.* People *ex rel.* Gillies v. Suffern, 68 N.Y. 321 (1877). In the latter case, it was held that the official oath taken by village trustees upon assuming office would not suffice in lieu of the oath, to be made in their capacity as assessors, required to be added to the assessment roll.

[72] 89 N.Y. 128 (1882).

The conclusion should not be drawn that the assessors' verification will be held invalid only in cases where the form of oath used by the assessors manifests a rebellious refusal by them to perform their prescribed duties. *Shattuck v. Bascom*,[75] decided in 1887, invalidated a tax title resting upon an assessment that had been incorrectly verified, apparently as a result of a scrivener's mistake. The assessors were required to swear that they had estimated the value of the real estate in the roll in accordance with the judgment of a majority of them, "with the exception of those cases in which the value of said real estate has been changed by reason of proof produced before us." Instead of the words "by reason of proof produced," the language of the oath actually made was "by reason hereof produced." The court of appeals regarded that variance as fatal, saying that such an oath could have been taken truthfully by the assessors even if they had overestimated or underestimated real estate and had thus made their assessment entirely unequal and unjust.[76]

We shall see that one of the effects of curative legislation of the sort referred to above [77] was to introduce still further refinements into the decisional law governing the consequences of defective verification of the assessment roll.[78] Consideration of cases on this subject decided under curative statutes will be deferred until the bearing of those statutes upon the whole concept of jurisdiction is treated in Part IV of this article.

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[73] See Barnard v. Brower, 110 N.Y. 77, 81, 17 N.E. 376, 378 (1888). The resulting situation was later described as having been "alarming." People *ex rel.* American Exch. Nat'l Bank v. Purdy, 196 N.Y. 270, 283, 89 N.E. 838, 843 (1909).

[74] See N.Y. Sess. Laws 1882, ch. 363; N.Y. Sess. Laws 1883, ch. 114; Terrel v. Wheeler, 123 N.Y. 76, 25 N.E. 329 (1890); Lamb v. Connolly, 122 N.Y. 531, 25 N.E. 1042 (1890); Bowns v. May, 120 N.Y. 357, 24 N.E. 947 (1890); Barnard v. Brower, 110 N.Y. 77, 17 N.E. 376 (1888); Clementi v. Jackson, 92 N.Y. 591 (1883).

[75] 105 N.Y. 39, 12 N.E. 283 (1887). *But cf.* Ensign v. Barse, 107 N.Y. 329, 14 N.E. 400, 15 N.E. 401 (1887).

[76] 105 N.Y. at 45, 12 N.E. at 285.

[77] See statutes cited notes 22, 23 *supra.*

[78] See, *e.g.*, Saranac Land & Timber Co. v. Roberts, 208 N.Y. 288, 101 N.E. 898 (1913); Ensign v. Barse, 107 N.Y. 329, 14 N.E. 400, 15 N.E. 401 (1887). Stated briefly, the position taken in those and related cases was that certain defects in the assessment of a tax that are jurisdictional in the first instance may be remedied by application of curative legislation. That position is stated by Finch, J., writing for the court in Ensign v. Barse, *supra* at 346, 15 N.E. at 401: "In the opinion then delivered [in Shattuck v. Bascom, *supra* note 75] the defect was not deemed jurisdictional in any other sense than the modified one of an essential condition under the law *as it stood*. Whether it was *so* jurisdictional as that the legislature could not have dispensed with it, and, therefore, could not cure its omission is a very

The sharp twists and turns of the litigation over the assessors' oath are characteristic of the decisional law in property taxation in the last century. It was not an easy matter to articulate the citizen's genuine need for protection against arbitrary official action with the need for some tolerance of official error in the practical operation of the state and local revenue system. It seems fair to say, considering the New York cases decided between 1852 and 1887 passing upon the effect of a deficiency in the assessors' verification, that the decisional law moved in the direction of requiring ever closer adherence by the assessors to the statutory form. It is remarkable that, unlike certain other issues that the court of appeals came gradually to resolve more and more favorably to the taxpayer,[79] this question never became explicitly the subject of legislation. The legislature never acted directly to repel the construction of the provision for the assessors' oath as mandatory rather than directive, despite the drastic consequences that such a construction sometimes entailed.[80]

3. *"Jurisdiction to Assess."*—While the court was elaborating, case by case, the distinction between mandatory and directive provisions of the tax statutes, it was also engaged in making a related parallel classification of errors in assessment as "jurisdictional" and "nonjurisdictional." The process of assessment is basic, of course, to the operation of a property tax system.[81] Broadly speaking, the town or city assessors' main functions have always included ascertaining the real property and special franchises within the taxing district and the names of the owners thereof, classifying property as exempt, partially exempt or nonexempt, and deciding upon full value of each separately assessed parcel both with and without improvements.[82] In the days of the personal property tax, the assessors were required also to ascertain the taxable inhabitants and taxable personal property within the district. The decisions of the assessors in these matters are reflected in their entries in the assessment roll for their tax district. Their decisions and entries are made in the first instance without notice or opportunity to be heard by the taxpayer.[83]

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different inquiry. A defect may be in one sense jurisdictional relatively to the authority of the assessors acting under an existing law, and yet not so as it respects the power of the legislature to pass a statute curing the defect. . . ." See ANNOTS., 134 A.L.R. 796 (1941), 140 A.L.R. 959 (1942).

[79] *E.g.*, the question of the evidentiary effect of the comptroller's deed, discussed in Part I of this article, 24 ALBANY L. REV. 271, 293–316 (1960). A similar phenomenon occurred in connection with the problem of the sufficiency of the description of the taxpayer's property in the assessment roll, to be discussed in Part III of this article. There, also, the legislature intervened to modify the strict requirements of the decisional law. N.Y. Sess. Laws 1902, ch. 171, § 2; N.Y. Sess. Laws 1911, ch. 315, § 6.

[80] For the aftermath of Brevoort v. City of Brooklyn, 89 N.Y. 128 (1882), see statutes and cases cited note 74 *supra*.

[81] See BLACK, TAX TITLES § 89 (2d ed. 1893), 1 COOLEY, TAXATION 595 (3d ed. 1903).

[82] See N.Y. REAL PROPERTY TAX LAW §§ 102(2), 306, 500, 502. The assessors also function as a board of review on grievance day. N.Y. REAL PROPERTY TAX LAW §§ 102(4), 512.

[83] The system would probably be unworkable otherwise. By making the original assessment an *ex parte* determination, the property tax law places the forces of inertia on the

Under the present law, the assessors are to "complete" the roll, tentatively, on or before the twenty-fourth day of June and forthwith cause a notice of that fact to be published in the official newspaper of the city or town.[84] The notice must contain a statement that a copy of the roll may be examined by any person at a specified place until the second Tuesday of July, and that the board of review (consisting usually of the assessors themselves) [85] will meet to hear complaints about the assessments at a specified time and place.[86] The board of review, in the hearing of complaints, may administer oaths, take testimony and hear proofs in regard to any complaint concerning an assessment. Thereafter, the board of review determines the final assessment of the property of each complainant and corrects the roll accordingly.[87]

After the hearing and determination of all complaints and the correction of the roll, the assessors verify the roll by annexing thereto an oath that, to the best of their knowledge and belief, they have set forth in the roll all real property in the tax district and, except for changes made by the board of review and special franchises assessed by the state board of equalization and assessment, have estimated the property at the sums "which we have decided to be the full value thereof." [88] After thus "finally completing" the roll, the assessors file a certified copy of it with the city or town clerk and publish the fact of completion and the availability of the "finally completed" roll for inspection. It is on the basis of the verified rolls from the cities and towns that the county equalization agency determines the county equalization rates for the several cities

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side of the taxing authorities in the first instance. The taxpayer must take affirmative action to reduce an overassessment. Under such a system, far fewer controversies are likely to arise than if the initial assessment required an adversary proceeding.

[84] N.Y. Real Property Tax Law § 506. In towns, the published notice must also be posted at the town clerk's office. *Ibid.* A nonresident of a city or town may file a demand for a list showing each parcel of real property assessed in his name, and, if he does, the assessors must mail him the requested information. N.Y. Real Property Tax Law § 508. Failure to comply with such demand does not affect the validity of the assessment. *Ibid.* A somewhat similar provision is contained in N.Y. Village Law § 105-a, applicable to notice of village assessments. That provision contains no saving clause covering the effect of failure by the village clerk to comply with a nonresident's demand for notice. Between June 24 and June 29, the assessors in towns must mail to each owner of real property in their town a notice of any increase in assessment for that year. N.Y. Real Property Tax Law § 510. Failure to mail such notice shall not prevent the levy, collection and enforcement of the payment of the taxes on such property. *Ibid.*

[85] N.Y. Real Property Tax Law § 102(4): "'Board of review' means the assessors, except that if another officer or body of officers is empowered to hear and determine complaint [sic] in relation to assessments it shall mean such other officer or body of officers." See also N.Y. Real Property Tax Law § 1408.

[86] N.Y. Real Property Tax Law § 512. On grievance day the board may adjourn the hearing of complaints from time to time, and it may accept complaints on any adjourned day. Complainants must file with the assessors at any time before the meeting of the board, or with the board at such meeting, a statement, under oath, specifying the respect in which the assessment complained of is illegal, erroneous or unequal. A complainant may appear personally or by his agent or representative.

[87] N.Y. Real Property Tax Law § 512(3). Such assessment may be greater than, the same as, or less than the original assessment, or, if determined to be illegal, the assessment must be stricken from the roll.

[88] N.Y. Real Property Tax Law §§ 514, 1410.

and towns, subject to review by the state board.[89] On the basis of the full valuation of taxable property in the county, as that appears from the proper equalization rates, the county board of supervisors levies the tax necessary to meet annual expenditures.[90] Through its employees, the county board then extends the taxes on the assessment rolls and annexes its warrant to the roll of each city or town to collect from the persons named in the roll the amounts of the tax listed opposite their names. Only after the warrant is annexed to the assessment roll does the roll become, technically speaking, the tax roll of the city or town involved.[91] Since 1880, a statutory procedure has been available for direct judicial review of a final determination of the assessors, on the ground of illegality, error by reason of overvaluation, or inequality.[92] Formerly, such review was available by writ of certiorari from the supreme court; today it is made by a proceeding to review an assessment under article 7 of the Real Property Tax Law.[93]

The courts have been impressed by the adjudicative features of certain of the assessors' functions described above. In 1866, Judge Hunt of the court of appeals expressed a commonly held view when he said:

> To administer oaths, to hear evidence, to weigh its effect, to compare it with the law, and to decide the question presented, are of the essence of judicial action. To make the figures indicating a deduction and to make the deduction itself, on the assessment-roll, may be conceded to be a ministerial act; but to arrive at the conclusion, by hearing and weighing evidence, judging of its credibility, and comparing the evidence with the provisions of law, that the plaintiff was entitled to a deduction, is as far from a ministerial act as can well be imagined.[94]

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[89] N.Y. Real Property Tax Law art. 8.

[90] N.Y. Real Property Tax Law § 900. For provisions relating to adoption of the county budget and the passing of an appropriation resolution, see N.Y. County Law art. 7, especially section 360.

[91] N.Y. Real Property Tax Law § 904. The tax roll is not complete and cannot serve as the basis of a levy unless the taxes are computed and the amounts extended on the roll by the board of supervisors. An entire roll was held invalid where the board of supervisors, after purporting to levy the tax, delivered the roll, unextended, with the board's warrant, to a single supervisor to make the computation and extension for his own town. People v. Hagadorn, 104 N.Y. 516, 10 N.E. 891 (1887).

[92] The earliest statute of general application providing for such review by certiorari was N.Y. Sess. Laws 1880, ch. 269. The writ of certiorari had been used as a common law process for reviewing assessments prior to enactment of that statute. See People *ex rel.* D. & H. Canal Co. v. Parker, 117 N.Y. 86, 22 N.E. 752 (1889); Western R.R. v. Nolan, 48 N.Y. 513, 519 (1872); Swift v. City of Poughkeepsie, 37 N.Y. 511, 516 (1868).

[93] The use of the writ of certiorari for review of assessments was abolished by N.Y. Sess. Laws 1949, ch. 551, § 2, which was formerly incorporated in the N.Y. Tax Law as section 290 and is now superseded by N.Y. Real Property Tax Law § 700. Former article thirteen of the N.Y. Tax Law, relating to proceedings to review a tax assessment, is superseded by article seven of the N.Y. Real Property Tax Law. Since 1896, legislation providing for review of assessments by the supreme court has required exhaustion of administrative remedies as a prerequisite. N.Y. Sess. Laws 1896, ch. 908, § 250; N.Y. Sess. Laws 1916, ch. 323, § 76; N.Y. Sess. Laws 1948, ch. 460, § 1; N.Y. Sess. Laws 1949, ch. 551, § 3; N.Y. Real Property Tax Law § 706.

[94] Hunt, J., concurring in Barhyte v. Shepherd, 35 N.Y. 238, 252 (1866). For other expressions of the view that assessors act judicially in determining the nature or value of

Accordingly, the theory was developed that where the assessors acted "within their jurisdiction," their assessments became like judgments, enforceable by the warrant issued by the county board of supervisors in the nature of a special execution.[95] A jurisdictionally valid assessment could not be collaterally attacked by an action in equity to restrain collection of the tax [96] and could not form the basis of a cause of action for damages against the assessors personally where they were deemed to have erred in their decisions.[97] On the other hand, if assessors had no jurisdiction to assess, they became personally liable for consequent damages. Thus, where a citizen's chattels were seized and sold under a jurisdictionally void assessment, the assessors were personally liable in trespass.[98] If the assessment was made without jurisdiction, it became subject to collateral attack; a tax lien or deed based upon it could be canceled in equity at the instance of the owner of the assessed land if the jurisdictional defect could be shown only by evidence dehors the record.[99] Originally, when the assessment was "void on its face," or where the proof necessary to enable a party to establish a claim under it would of itself have shown that the assessment was void, then a bill to set aside the assessment or remove the cloud upon the title would not lie, since a legal defense was available to any claim made under the tax.[100] Later, whenever the applicable tax statute contained, as the general tax law did after 1850,[101] a provision making a tax deed presumptive evidence of the regularity of prior proceedings, it was held that any tax deed, though

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property subject to assessment, see, *e.g.*, Goetcheus v. Matthewson, 61 N.Y. 420, 429–30 (1875); National Bank v. City of Elmira, 53 N.Y. 49, 53 (1873); People *ex rel.* Glens Falls Ins. Co. v. Ferguson, 38 N.Y. 89, 92 (1868); People *ex rel.* Stephens v. Halsey, 37 N.Y. 344, 346 (1867); In the Matter of Donner-Hanna Coke Corp., 212 App. Div. 338, 341, 209 N.Y. Supp. 62, 65, *aff'd,* 241 N.Y. 530, 150 N.E. 541 (1925).

[95] Western R.R. v. Nolan, 48 N.Y. 513, 518 (1872).

[96] United Lines Tel. Co. v. Grant, 137 N.Y. 7, 32 N.E. 1005 (1893); Western R.R. v. Nolan, 48 N.Y. 513 (1872); Susquehanna Bank v. Board of Supervisors, 25 N.Y. 312 (1862); Trumbull v. Palmer, 104 App. Div. 51, 93 N.Y. Supp. 349 (1905); Postal Tel. Cable Co. v. Grant, 58 Hun 603, 11 N.Y. Supp. 323 (Sup. Ct., Gen. Term), *appeal dismissed,* 128 N.Y. 633, 29 N.E. 147 (1891). The converse proposition is not true; it does not follow that a jurisdictionally invalid assessment may always be enjoined in equity, since the remedy at law may be adequate. Townsend v. The Mayor, 77 N.Y. 542 (1879); Stuart v. Palmer, 74 N.Y. 183 (1878); Marsh v. City of Brooklyn, 59 N.Y. 280 (1874).

[97] Williams v. Weaver, 75 N.Y. 30 (1878), *aff'd,* 100 U.S. 547 (1879); Barhyte v. Shepherd, 35 N.Y. 238 (1866); Weaver v. Devendorf, 3 Denio 117 (N.Y. Sup. Ct. 1846). A similar rule is applied to protect a collector who proceeds on the basis of a warrant valid on its face. Hudler v. Golden, 36 N.Y. 446 (1867); Parish v. Golden, 35 N.Y. 462 (1866).

[98] Clark v. Norton, 49 N.Y. 243, 246 (1872) (dictum); Mygatt v. Washburn, 15 N.Y. 316 (1857).

[99] Elmhurst Fire Co. v. City of New York, 213 N.Y. 87, 106 N.E. 920 (1914); Strusburgh v. The Mayor, 87 N.Y. 452 (1882). A jurisdictional defect renders the assessment open to review by an action for a declaratory judgment. Dun & Bradstreet, Inc. v. City of New York, 276 N.Y. 198, 11 N.E.2d 728 (1937).

[100] Townsend v. The Mayor, 77 N.Y. 542 (1879); Stuart v. Palmer, 74 N.Y. 183 (1878); Marsh v. City of Brooklyn, 59 N.Y. 280 (1874); Hatch v. City of Buffalo, 38 N.Y. 276 (1868); see also Scott v. Onderdonk, 14 N.Y. 9 (1856).

[101] See statutes cited note 2 *supra.*

provably void for want of jurisdiction in the original assessment, was a sufficient cloud on title to support an action in equity for cancellation.[102]

The characterization of an error in an assessment as jurisdictional or nonjurisdictional was therefore crucial in determining both the substantive and remedial rights of the owners of the property assessed. Some classifications were fairly obvious. Thus, an error in determining the amount of an assessment was deemed nonjurisdictional,[103] as was an error in deciding that an owner, otherwise validly assessed, was not entitled to partial exemption.[104] On these matters, as long as they had jurisdiction in other respects, the final determination of the assessors was considered res judicata, subject only to revision in the taxpayer's favor in certain circumstances by the county board of supervisors and by the supreme court in certiorari proceedings.[105]

On the other hand it was held that assessors had no jurisdiction to assess land located outside their tax district,[106] to assess land of a nonresident as if it were owned by a resident,[107] or to assess a nonresident for personal property.[108] The court of appeals made clear at the outset that in making decisions on questions of fact in such matters, the assessors acted at their peril;[109] when their right to act depended upon the existence of some fact, an assessment founded upon their erroneous determination of the existence of such fact was illegal.[110] Like other officers of government, they could not acquire jurisdiction by deciding that they had it. If the assessment was made without jurisdiction, all subsequent proceedings were deemed invalid. Thus, where an assessment for a street improvement was made to the wrong person, it was held void, and a purchaser of a tax certificate was permitted to recover from the city the amount he had paid for the certificate, on the ground of an entire failure of consideration.[111] Where assessors assessed a national bank for personal property, consisting exclusively of its capital stock invested in United States bonds, in violation of an express statutory prohibition, the resulting assessment, levy and collection were void, and the municipality that received the proceeds was liable for conversion.[112]

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[102] Stewart v. Crysler, 100 N.Y. 378, 3 N.E. 471 (1885).

[103] Williams v. Weaver, 75 N.Y. 30 (1878), *aff'd,* 100 U.S. 547 (1879); Weaver v. Devendorf, 3 Denio 117 (N.Y. Sup. Ct. 1846).

[104] Barhyte v. Shepherd, 35 N.Y. 238 (1866); Broderick v. City of Yonkers, 22 App. Div. 448, 48 N.Y. Supp. 265 (1897), *aff'd,* 163 N.Y. 571, 57 N.E. 1105 (1900).

[105] The county board of supervisors may make such changes in the descriptions of real property in the assessment rolls as may be necessary to render them sufficiently definite for the purpose of enforcement of collection of taxes by tax sale. N.Y. REAL PROPERTY TAX LAW § 556. The board may also correct any manifest error on a roll properly before the board for its action, confirmation or review. *Ibid.* The board of trustees of a village may correct certain errors on a village assessment roll upon application of the assessors by a verified petition. N.Y. REAL PROPERTY TAX LAW § 1412. In a proceeding for judicial review of an assessment the supreme court may order an illegal assessment stricken from the roll; if an assessment is erroneous or unequal, the court must order a reassessment or a correction of the roll. N.Y. REAL PROPERTY TAX LAW § 720.

[106] Saranac Land & Timber Co. v. Roberts, 195 N.Y. 303, 88 N.E. 753 (1909) (alternative holding).

[107] Ritter v. Worth, 58 N.Y. 627 (1874); Whitney v. Thomas, 23 N.Y. 281 (1861); People *ex rel.* Mygatt v. Supervisors of Chenango County, 11 N.Y. 563 (1854) (alternative holding).

[108] Dorwin v. Strickland, 57 N.Y. 492 (1874).

[109] Mygatt v. Washburn, 15 N.Y. 316, 321 (1857).

[110] National Bank v. City of Elmira, 53 N.Y. 49, 58 (1873).

Not all assessments made in violation of a statutory or constitutional provision may be classified as jurisdictionally invalid under the New York decisions. In *Swift v. City of Poughkeepsie*,[113] a resident of Poughkeepsie brought an action against the city to recover the payment of property taxes assessed against him as owner of shares of stock in a national bank which had investments in United States bonds. The assessors had assessed plaintiff separately for his other property and added the bank shares as a separate item at the end of the resident part of the roll.[114] Swift had not contested the assessment by certiorari proceedings. In treating the shares as part of plaintiff's taxable property, the assessors had followed the rulings of the New York Court of Appeals denying claims for exemption of similar national bank shares.[115] After the United States Supreme Court reversed the New York decisions and held that the state tax statute had been unconstitutionally applied to permit the inclusion of such shares,[116] Swift brought an action against the city for money had and received. Concurrent actions in trespass against the assessors and collector were brought by two other taxpayers similarly situated.[117] The court of appeals treated the entire group of cases as turning upon the question whether the assessors had had jurisdiction originally. It was held that they had acquired jurisdiction of the persons of the taxpayers, as residents, and of the "subject matter," namely, residents' personal property located in the tax district, and were consequently not liable in trespass for seizing the claimants' property in enforcement of the tax.[118] The officials involved had followed the apparent mandate of state legislation that the court of appeals itself had held constitutional and were entitled to the protection accorded "to all tribunals and parties" acting judicially.[119] Swift's action against the city for restitution was also dismissed. Restitution of a tax mistakenly assessed could not be permitted where the officials assessing, levying and collecting the tax had acted within their jurisdiction, since a final assessment was to be regarded as res judicata on any question of error in amount or basis of assessment.[120] The court seemed troubled by the plaintiff's resulting lack of judicial remedy and suggested, rather doubtfully, that he should have raised the constitutional question originally on certiorari to review the assessment.[121] If the city authorities should not possess sufficient honesty

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[111] Chapman v. City of Brooklyn, 40 N.Y. 372 (1869).

[112] National Bank v. City of Elmira, 53 N.Y. 49 (1873).

[113] 37 N.Y. 511 (1868).

[114] This fact appears in the report of the same case on its first hearing in the court of appeals *sub nom.* Foster v. Van Wyck, 41 How. Pr. 493, 494, 2 Abb. App. Dec. 167, 169 (N.Y. 1867).

[115] City of Utica v. Churchill, 33 N.Y. 161, *rev'd sub nom.* Van Allen v. The Assessors, 70 U.S. (3 Wall.) 573 (1865); People *ex rel.* Bank of Commonwealth v. The Commissioners, 23 N.Y. 192 (1861), *rev'd sub nom.* Bank Tax Case, 69 U.S. (2 Wall.) 200 (1864); People *ex rel.* Bank of Commerce v. The Commissioners, 26 N.Y. 163, *rev'd sub nom.* Bank of Commerce v. New York City, 67 U.S. (2 Black) 620 (1863).

[116] See cases cited note 115 *supra.*

[117] All three actions were consolidated in the court of appeals under the title Foster v. Van Wyck, 41 How. Pr. 493, 2 Abb. App. Dec. 167 (N.Y. 1867).

[118] Foster v. Van Wyck, *supra* note 117.

[119] 37 N.Y. at 512.

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[120] *Id.* at 514. *Accord,* United States Trust Co. v. The Mayor, 144 N.Y. 488, 39 N.E. 383 (1895); People *ex rel.* Knickerbocker Fire Ins. Co. v. Coleman, 107 N.Y. 541, 14 N.E. 431 (1887); Werking v. Amity Estates, Inc., 1 Misc. 2d 639, 150 N.Y.S.2d 280 (Sup. Ct. 1954), *aff'd,* 1 App. Div. 2d 731, 147 N.Y.S.2d 474 (1955). A similar rule is applied in New York to payment of a street assessment: though erroneous, if it is valid on its face and not "jurisdictionally void," it cannot be recovered until the assessment has been vacated. Trimmer v. City of Rochester, 130 N.Y. 401, 29 N.E. 746 (1892). In cases falling within the purview of N.Y. Second Class Cities Law §§ 164, 165, no action may be maintained to vacate an improvement assessment other than one void for total want of jurisdiction, and even such an action must follow a specified procedure. In such a case, application for relief must be made within twenty days after confirmation of the improvement assessment. Oak Hill Country Club v. Town of Pittsford, 264 N.Y. 133, 190 N.E. 321 (1934).

[121] 37 N.Y. at 516. For limitations on the common law remedy of certiorari, see 2 COOLEY, TAXATION 1400–10 (3d ed. 1903). An "illegal" assessment has been reviewable since 1880 by statutory certiorari or similar proceeding. See statutes cited notes 92, 93 *supra.* The statutory remedy is not exclusive, however, if the assessment is jurisdictionally void; in such a case, the assessment may be collaterally attacked. People *ex rel.* Erie R.R. v. State Tax Commission, 246 N.Y. 322, 158 N.E. 884 (1927) (dictum); Elmhurst Fire Co. v. City of New York, 213 N.Y. 87, 106 N.E. 920 (1914); McLean v. Jephson, 123 N.Y. 142, 25 N.E. 409 (1890). The first of those three cases was itself a certiorari proceeding, but the relator had not exhausted its administrative remedy before seeking judicial review. It was held that since the assessment was jurisdictionally invalid, certiorari was available without complying with the statutory requirement of prior exhaustion of administrative remedy. Compare Oak Hill Country Club v. Town of Pittsford, 264 N.Y. 133, 190 N.E. 321 (1934); New York Cent. & H.R. R.R. v. City of Yonkers, 238 N.Y. 165, 144 N.E. 490 (1924), applying a statutory limitation on the time for bringing an action to vacate a void improvement assessment.

Whether statutory certiorari or its modern equivalent is available to review a jurisdictionally void assessment is not entirely clear. It was held in People *ex rel.* D. & H. Canal Co. v. Parker, 117 N.Y. 86, 22 N.E. 752 (1889) that certiorari was not available for challenging a purported assessment made by usurpers who were not assessors either *de facto* or *de jure.* In the course of its opinion, the court suggested that the statutory certiorari proceeding provided by N.Y. Sess. Laws 1880, ch. 269, was available only where the assessment was made by proper officers and was not wholly and altogether void. 117 N.Y. at 90, 22 N.E. at 753. That statement, apparently limiting the scope of the statutory proceeding to review to cases of illegality, inequality or overevaluation falling short of jurisdictional invalidity, was applied in People *ex rel.* Eckerson v. Zundel, 34 App. Div. 626, 54 N.Y. Supp. 1112 (1898) to deny certiorari where relator's name appeared on the roll but in such a manner that there was clearly no assessment against him. The same limitation on availability of the remedy was apparently thought of as controlling in Dells, Inc. v. Ossman, 15 Misc. 2d 237, 184 N.Y.S.2d 884 (Sup. Ct. 1958), where the court found, however, that the roll was not jurisdictionally defective. In Van Deventer v. Long Island City, 139 N.Y. 133, 137, 34 N.E. 774, 775 (1893), the court of appeals said, *obiter,* that the statutory certiorari proceeding was not applicable to a case where the entire roll is claimed to be illegal and void, but only to cases where there is a valid roll in which some person has been for some reason illegally assessed, or where the assessment is excessive or unjust. However, that principle has been limited by the appellate division to cases where the illegality goes to the "judicial quality" of the assessment. Allen Square Co. v. Krieger, 217 App. Div. 123, 127, 216 N.Y. Supp. 458, 462 (1926). In the latter case, accordingly, it was held that on to refund the money voluntarily, said the court, the taxpayer would have to go to the legislature for relief.[122]

Five years after the *Swift* decision, the court decided *National Bank v. City of Elmira,*[123] in which an assessment of the capital of plaintiff bank had been made in direct violation of a state law forbidding assessments of bank capital. The bank refused to pay the tax, and the collector seized and sold some of the bank's property and remitted the proceeds to the city of Elmira. The court of appeals held that an action against the city would lie since the assessors had acted without jurisdiction and their decision was therefore subject to collateral attack. The court distinguished *Swift v. City of Poughkeepsie* on the ground that the error in that case had been merely one of assessing "at the wrong rate" [124] a person who was otherwise assessable for his personal property. The court said that *Swift v. City of Poughkeepsie* had resembled an earlier case treating as nonjurisdictional a failure to allow a partial exemption,[125] whereas in the instant case there was no authority whatever to assess the national bank on its capital. The situation was more like that of assessing a nonresident for personalty [126] or assessing a person entitled to total exemption: [127] in neither of those situations did assessors acquire jurisdiction. Furthermore, in the *Swift* case the assessors had acted in accordance with state law as construed by the highest court of the state and should hardly have been treated as culpable for doing so. Here, the assessment of bank capital was not only unconstitutional but in clear violation of statute. It was, therefore, open to collateral attack as jurisdictionally invalid, and the city was liable for its share of the proceeds of the resulting tax. The remedy of certiorari would have been inadequate because "dilatory" and "discretionary." [128]

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certiorari proceedings it was improper to go into the question of constitutionality of local charter provisions relative to qualification of personnel making and reviewing assessments, or into the question of the qualification of a hold-over assessor to file the roll. On the other hand, it was held in that case that allegations of illegality resulting from insufficiency of verification and from an unsound theoretical basis for the assessment were within the scope of statutory certiorari. See also People *ex rel.* Friendly v. Davenport, 119 App. Div. 790, 104 N.Y. Supp. 332 (1907), permitting the use of statutory certiorari proceedings to challenge an assessment on the ground that the assessors did not give proper notices, did not complete the roll in time, and added relator's name after they had ceased to have the power to do so.

[122] 37 N.Y. at 517.

[123] 53 N.Y. 49 (1873).

[124] *Id.* at 58.

[125] Barhyte v. Shepherd, 35 N.Y. 238 (1866).

[126] Mygatt v. Washburn, 15 N.Y. 316 (1857).

[127] Prosser v. Secor, 5 Barb. 607 (N.Y. Sup. Ct. 1849). Assessors have no jurisdiction to assess the property of a person entitled to total exemption. Aetna Ins. Co. v. The Mayor, 153 N.Y. 331, 47 N.E. 593 (1897); In the Matter of New York Catholic Protectory, 77 N.Y. 342 (1879).

[128] 53 N.Y. at 59. The court was referring to common law certiorari, of course. Compare Buffalo & S.L.R.R. v. Board of Supervisors, 48 N.Y. 93, 100 (1871); People *ex rel.* Western R.R. v. Board of Assessors, 40 N.Y. 154 (1869); People *ex rel.* Citizens' Gas-Light Co. v. Board of Assessors, 39 N.Y. 81 (1868).

In the course of his opinion in *National Bank v. City of Elmira*, Chief Judge Church laid down the following test for determining whether errors in assessment are jurisdictional:

> The distinction is between an erroneous and an illegal assessment. The former is when the officers have power to act, but err in the exercise of the power; the latter where they have no power to act at all, and it does not aid them to decide that they have.[129]

So abstract a formula would hardly have provided much assistance in the solution of new problems without the benefit of the already considerable body of decisions that it purported to rationalize. Thanks to that decisional background, however, Chief Judge Church's distinction proved fairly predictable in application—more so, at least, than the comparable distinction, discussed above, between mandatory and directive statutory provisions.[130]

The jurisdictional test was applied in later cases to reaffirm the established rule that assessors were liable for erroneously assessing a nonresident for personal property even where they decided the question of residency deliberately and after diligent inquiry;[131] to invalidate a tax deed based upon an assessment made and entered on the roll without the taxpayer's knowledge after the roll was completed;[132] and to sustain recovery, by divers procedures, of taxes collected on the basis of assessment of land owned by organizations entitled to total exemption.[133] The test was applied on the other hand to protect assessors from personal liability where the amount of the assessment of a resident taxpayer on his personal property was clearly excessive as a result of use of a legally erroneous basis for valuation,[134] and to deny relief in the form of a collateral action to compel restitution of excessive taxes paid under a merely erroneous assessment.[135]

The basic difficulty with the concept of jurisdiction to assess was that it was being relied on to decide cases involving basically diverse considerations. One type of case involved the question of the extent to which assessors should be protected from personal liability. Here it seemed wise to give the assessors the same protection as is afforded to judicial officers, at least to the extent that the assessors acted within the field of their presumed special competence, namely, making valuations. Furthermore, in order that budgeting and appropriation of municipal funds might proceed free from the hazard of a large contingent liability for refunds, it seemed sound policy to insist that errors in valuation, whatever their source, be corrected promptly by administrative review or by certiorari or not at all. A second type of case raised the question of whether official proceedings subsequent to assessment, such as tax sales to enforce collection and conveyances executed pursuant thereto, should be regarded as vulnerable to collateral attack based on some error in the original assessment. Here, the assessors' need for protection and the municipality's need for stability in its basis for fiscal planning were not directly involved, and the consideration of fair play for the taxpayer appeared relatively more impressive than in the first type of case. Finally, the question of the most orderly and efficient form of procedure for the citizen to follow to obtain redress for an illegally assessed, levied or collected tax called for the exercise of judicial statecraft to accommodate the general rules of civil procedure to the special problems of the property tax field.

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[129] 53 N.Y. at 58.

[130] See text accompanying notes 24–80 *supra*.

[131] Dorn v. Backer, 61 N.Y. 261 (1874); Dorwin v. Strickland, 57 N.Y. 492 (1874); *cf.* Hilton v. Fonda, 86 N.Y. 340 (1881).

[132] Overing v. Foote, 65 N.Y. 263 (1875).

[133] Union Steamboat Co. v. City of Buffalo, 82 N.Y. 351 (1880); Williams v. Board of Supervisors, 78 N.Y. 561 (1879); In the Matter of New York Catholic Protectory, 77 N.Y. 342 (1879); *cf.* In the Matter of Estate of Ford, 198 Misc. 69, 96 N.Y.S.2d 177 (Surr. Ct. 1950), *appeal dismissed*, 278 App. Div. 1029, 107 N.Y.S.2d 712 (1951).

[134] Williams v. Weaver, 75 N.Y. 30, *aff'd*, 100 U.S. 547 (1878).

[135] United States Trust Co. v. The Mayor, 144 N.Y. 488, 39 N.E. 383 (1895); Hermance v. Board of Supervisors, 71 N.Y. 481 (1877); Worden v. Oneida County, 35 App. Div. 206, 54 N.Y. Supp. 952 (1898).

By about 1890, the cases indicated rather clearly that the New York courts were going to decide all three types of cases by application of the jurisdictional test, in the absence of special statute to the contrary: [136] if the assessors had "jurisdiction," three consequences followed: (1) The assessors were protected from personal liability; (2) subsequent acts and proceedings in the taxing process by officials also having jurisdiction were immune from collateral attack; and, (3) the sole remedy for challenging an assessment merely as excessive was by writ of certiorari or comparable statutory proceeding.[137] Whereas, if the assessors lacked jurisdiction, they were personally liable for resulting damage, and subsequent proceedings for levy, collection or enforcement were subject to some forms of collateral attack.[138]

The rule permitting collateral attack upon a jurisdictionally invalid assessment was subject to an important qualification: an action could not be maintained in equity to vacate a tax assessment and restrain its collection merely on the ground that the assessment was invalid.[139] It was deemed to be against public policy to permit the delaying of collection by such an action. But that qualification was in turn greatly limited in application by the rule that an action in equity could be maintained to vacate a void assessment that created a lien upon land, where the invalidity did not appear upon the face of the record and would not necessarily appear in any proceeding by a tax purchaser to obtain possession of the land.[140] Where the invalidity did appear on the face of the record or would necessarily appear in any proceeding by a tax purchaser to obtain possession of the land, it was thought that the owner's remedy at law by way of defense to a tax purchaser's action of ejectment would be adequate. A jurisdictional invalidity that would necessarily so appear did not create even an apparent lien clouding the title.[141]

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[136] See, *e.g.*, N.Y. Second Class Cities Law §§ 164, 165, regulating the procedures for obtaining relief from void improvement assessments in cities of the second class.

[137] See cases cited notes 120, 134, 135 *supra.*

[138] Cases cited notes 131, 132, 133 *supra;* see also Stampers Arrival of Buyers, Inc. v. City of New York, 296 N.Y. (Mem.) 574, 68 N.E.2d 871, *motion for reargument denied,* 296 N.Y. 668, 69 N.E.2d 821 (1946); Dun & Bradstreet, Inc. v. City of New York, 276 N.Y. 198, 11 N.E.2d 728 (1937); People *ex rel.* Erie R.R. v. State Tax Commission, 246 N.Y. 322, 158 N.E. 884 (1927) (dictum); Elmhurst Fire Co. v. City of New York, 213 N.Y. 87, 106 N.E. 920 (1914); McLean v. Jephson, 123 N.Y. 142, 25 N.E. 409 (1890); Strusburgh v. The Mayor, 87 N.Y. 452 (1882); *cf.* Brown v. New York State Tax Commission, 199 Misc. 349, 99 N.Y.S.2d 73 (Sup. Ct. 1950), *aff'd,* 279 App. Div. 837, 109 N.Y.S.2d 626, *aff'd.* 304 N.Y. 651, 107 N.E.2d 510 (1952).

[139] Hoffeld v. City of Buffalo, 130 N.Y. 387, 29 N.E. 747 (1892); Guest v. City of Brooklyn, 69 N.Y. 506 (1877); Heywood v. City of Buffalo, 14 N.Y. 534 (1856).

Here, however, occurred a peculiar and probably unforeseen effect of legislative efforts to strengthen tax titles by providing that tax certificates and deeds should be presumptive evidence of the validity of antecedent proceedings. Where the legislation under which a tax or improvement assessment is laid contains such an evidentiary provision, a tax deed becomes entitled to a statutory presumption of validity, with the result that the invalidity of the tax or assessment may not necessarily appear in the ultimate proceeding by a tax purchaser to obtain possession of the land. In cases where such a presumption was available to support a tax deed, the court of appeals took the position that equitable relief should be granted to clear the owner's title of the apparent lien of the void assessment.[142] When the general tax law was amended to provide for such a presumption of validity,[143] the result was to open almost every jurisdictionally invalid assessment to attack by an action in equity to vacate or set aside the assessment, provided its invalidity did not appear on the face of the record.[144] Thus, the legislation designed to strengthen tax titles, by according them prima facie validity, was given an application that increased the landowner's opportunities for challenging assessments by court action in the first instance.[145]

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[140] Rumsey v. City of Buffalo, 97 N.Y. 114 (1884); Scott v. Onderdonk, 14 N.Y. 9 (1856).

[141] Cases cited note 139 *supra.*

[142] Cases cited note 140 *supra.*

[143] Statutes cited note 2 *supra.*

[144] See Stewart v. Crysler, 100 N.Y. 378, 3 N.E. 471 (1885). However, it was held in Townsend v. The Mayor, 77 N.Y. 542 (1879), that where the sole ground of illegality of an assessment is that the law under which the tax was imposed is unconstitutional, equitable relief must be denied, since such invalidity must always appear in any tax purchaser's action to enforce his title.

[145] The writer has found no substantial evidence that the availability of such a remedy embarrasses municipalities in their fiscal planning as far as general taxes are concerned. With respect to improvement assessments, however, the intervention of the courts, sometimes long after the installation of the improvements involved, proved troublesome enough to evoke restrictive legislation. In 1880, a one-year statute of limitations was placed upon proceedings to vacate or reduce improvement assessments in the City of New York, with specified exceptions. N.Y. Sess. Laws 1880, ch. 550, § 13. That provision has been carried forward into section 311-7.0 of the Administrative Code of the City of New York, to bar any proceeding to vacate or reduce an assessment that is not brought within one year after confirmation. The Code contains other provisions apparently limiting judicial intervention. ADMINISTRATIVE CODE OF CITY OF NEW YORK §§ 311-1.0, 311-2.0, 311-4.0, 311-6.0. However, those provisions, as well as the one-year statute of limitations, have been held not to exclude a remedy in equity to set aside an assessment as jurisdictionally

In accordance with the theory that a jurisdictionally valid assessment should not be subject to collateral attack, several cases denied restitution of money paid on an excessive assessment where the assessors were deemed to have had jurisdiction to assess but had made their valuation upon an erroneous or illegal basis and where their assessment remained unvacated and unreversed.[146] Several early cases permitted restitution of a tax paid on an illegal assessment where the taxpayer had already succeeded in having the assessment set aside by an action in equity or by certiorari proceedings.[147]

A crucial case for the evolving pattern of remedies turned out to be *Strusburgh v. The Mayor,*[148] decided in 1882, where an improvement assessment had been levied that was valid on its face and an apparent lien on the lands assessed but which was, in fact, partially illegal because the sum paid by the municipality to the contractor for work on the improvement exceeded the contract price. The plaintiff had paid the assessment. When later the municipality recovered the surplus sum illegally paid to the contractor, plaintiff brought an action against the municipality in equity, rather than at law, for a declaration that the assessment had been invalid to the extent of the overpayment and for restitution of the illegal excess. Cancellation of the assessment *pro tanto* and restitution were permitted, on the theory that the plaintiff had paid under mistake, without negligence, and that equity had jurisdiction to give relief that was available from no other source. Since the original assessment had been jurisdictionally valid and had not been reduced by certiorari, it was not easy to find a basis for collateral attack. On this point, the court said, per Earl, J.:

> So far as the assessment stands in the way, it can be removed. It matters not that it is in the nature of a judgment, for courts of equity will, on the grounds of mistake, fraud or surprise, relieve even against judgments of courts which have been regularly taken and are regular in form.[149]

Furthermore:

> It will not be against public policy to allow an action, under the circumstances of this case, to be maintained. The assessments have been collected and the revenue for public purposes has been realized. It will be no more embarrassing for a municipality to be compelled to pay this debt than to be compelled to pay a debt of any other kind. Under such circumstances there can be no public policy which will be served or promoted

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invalid for some cause other than fraud or substantial error. Cooper Union v. City of New York, 272 App. Div. 438, 71 N.Y.S.2d 204 (1947), *aff'd,* 298 N.Y. 578, 81 N.E.2d 108 (1948). Comparable provisions applicable to second-class cities limit the time within which an action to set aside an improvement assessment may be brought in such cities. N.Y. Second Class Cities Law §§ 164, 165.

[146] Wilkes v. The Mayor, 79 N.Y. 621 (1879) (*semble*); Bank of Commonwealth v. The Mayor, 43 N.Y. 184 (1870); Swift v. City of Poughkeepsie, 37 N.Y. 511 (1868).

[147] Peyser v. The Mayor, 70 N.Y. 497 (1877); Bank of Commonwealth v. The Mayor, *supra* note 146.

[148] 87 N.Y. 452 (1882).

[149] *Id.* at 456–57.

> by depriving a citizen of the money justly due him, and leaving it where it has been placed by the illegal action of a municipality or its officers.[150]

The court may have been assisted in coming to its somewhat surprising decision by an indiscreet concession of defendants' counsel that if the assessment had remained unpaid, plaintiff could have maintained an action to vacate it as a cloud upon his title.[151] The court could see no reason for denying equitable relief in the form of a judgment vacating the assessment *pro tanto* for the unlawful excess and granting restitution where, if the assessment had remained unpaid, equitable relief would have been available to clear a cloud on title. The *Strusburgh* case did not make any substantial breach in the doctrine of jurisdiction as it related to remedies since, essentially, the plaintiff was not attacking the assessment collaterally: the city by its own action in recovering from the contractor had itself established the excessive nature of the original assessment, so that the usual vice of collateral attack on a merely excessive assessment was not present. Without the prior recovery by the city from the contractor, however, plaintiff's action might well have failed by application of the orthodox rule.

The importance of the *Strusburgh* case lay in its rationale, that wherever an assessment is valid on its face and creates an apparent lien on the land assessed but is in fact jurisdictionally invalid, an action for restitution is available to recover amounts involuntarily paid under it. Thereafter, it was a simple step, in the case of an assessment made without jurisdiction, to abandon the prerequisite suggested in the earlier restitution cases, that an assessment must be vacated or reversed before recovery of amounts paid under it may be permitted. The court of appeals took that step four years later,[152] with the result that, after 1886, restitution of amounts paid under an assessment characterized as jurisdictionally invalid was not denied merely on the ground of improper collateral attack, even though no action to set aside or vacate the assessment had been brought.[153] The later restitution cases came to turn on other, quite different issues, discussion of which would lead too far afield.[154] However, the rule barring collateral attack on jurisdictionally valid assessments continued to be followed after the *Strusburgh* case: unless such an assessment, valid on its face but in fact irregularly made, has been modified or vacated, it may not be collaterally attacked in an action to recover payments made under it.[155]

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[150] 87 N.Y. at 457. Compare Lewis v. City of Lockport, 276 N.Y. 336, 343, 12 N.E.2d 431, 434 (1938), involving a city charter provision limiting the time for setting aside an assessment: "Unless the statutory remedy is exclusive, the property owner may delay many years before instituting action to set an assessment aside as a cloud on title. . . . In this very case there was a delay of six or seven years between the confirmation of the assessment and the institution of the action. Such a delayed attack, if successful, tends to disrupt budgets and tax plans. . . ."

[151] 87 N.Y. at 455.

[152] Jex v. The Mayor, 103 N.Y. 536, 9 N.E. 39 (1886); Bruecher v. Village of Port Chester, 101 N.Y. 240, 4 N.E. 272 (1886) (dictum).

[153] Mutual Life Ins. Co. v. The Mayor, 144 N.Y. 494, 39 N.E. 386 (1895); In the Matter of City of New York (Woodhaven Blvd.), 260 App. Div. 659, 23 N.Y.S.2d 561 (1940); *cf.* Diefenthaler v. The Mayor, 111 N.Y. 331, 19 N.E. 48 (1888); Jex v. The Mayor, 111 N.Y. 339, 19 N.E. 52 (1888). The last two cases hold that an action for restitution in such cases is governed by the six-year statute of limitations.

[154] See Welsh, *Restitution of Taxes Paid Under Mistake in New York,* 24 ALBANY L. REV. 317 (1960).

The concept of jurisdiction to assess was to undergo further elaboration in cases applying the curative statutes of 1885, 1891 and 1893, referred to above.[156] It was by no means a foregone conclusion that every defect treated as "jurisdictional" for one of the purposes so far discussed would be regarded as permanently fatal for purposes of applying a curative statute. In Part IV of this article, we shall consider the further development of the concept of jurisdiction in new applications. First, however, it will be necessary to examine the doctrine of notice as applied in tax proceedings, since the failure of officials to comply with statutory provisions requiring notice of their compulsory acts in the course of the taxing process has been a major source of invalidity in tax titles. That inquiry will form the subject of Part III of this article.

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[155] United States Trust Co. v. The Mayor, 144 N.Y. 488, 39 N.E. 383 (1895); Trimmer v. City of Rochester, 130 N.Y. 401, 29 N.E. 746 (1892).

[156] See statutes cited note 2 *supra*.

COMMENTS

A Limitation on Caveat Venditor

The purchaser of personal property has two remedies by which he may recover for injuries caused by a defective product: an action based upon negligence [1] and one grounded in breach of warranty.[2] Usually, the latter offers the more attractive avenue of redress as there is no requirement of showing that the defect present at the time of sale resulted from a default of the seller. Because a defense, based upon the seller's allegation that he used the highest degree of care in the prepartion or distribution of the product, is unavailable in the warranty of merchantability action,[3] it has been suggested that the vendor of chattels is under an "insurer's" liability [4] and that the law has shifted from caveat emptor to caveat venditor.

The most severe limitation on the warranty cause of action has been the requirement that the plaintiff be in privity of contract with the person against whom suit is brought. This rule, the object of much criticism,[5] has been abandoned in greater or less degree by a number of jurisdictions.[6] Indicative of the extent to which some courts have abrogated the privity doctrine is the recent New Jersey case, *Henningsen v. Bloomfield Motors, Inc.*[7] Destined to be a leading case on this subject, *Henningsen* held that the implied warranty of fitness accompanying the sale of an automobile extended not only to the immediate buyer but also through him to members of his family and to others occupying or using the car with his consent. No attempt was made to define the outer periphery of the warranty obligation.

Agitation for a relaxation of the privity doctrine has also been present in New York.[8] No decision of the court of appeals has as yet reversed the leading case of *Chysky v. Drake Bros. Co.*[9] which commits New York to the privity requirement; but the possibility that New York may adopt a position akin to that of its sister state is not remote.[10]

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[1] See, *e.g.*, MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[2] "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment . . . there is an implied warranty that the goods shall be reasonably fit for such purpose." N.Y. Personal Property Law § 96(1); Uniform Sales Act § 15(1). "Where the goods are bought by description from a seller who deals in goods of that description . . . there is an implied warranty that the goods shall be of merchantable quality." N.Y. Personal Property Law § 96(2); Uniform Sales Act § 15(2).

[3] 1 Williston, Sales §§ 237, 237(a) (1948), where early New York cases which failed to distinguish clearly between negligence and warranty actions are criticized. See also James, *Products Liability,* 34 Tex. L. Rev. 192, 226 (1955).

[4] See Condon, *The Progress of Products Liability Law,* 31 N.Y.S.B. Bull. 119, 128 (1959). *But see* 1 Frumer and Friedman, Products Liability § 16.03[4] (1960).

[5] Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer),* 69 Yale L.J. 1099 (1960).

[6] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958). See 1 Williston, Sales § 244(a)-(f) (Supp. 1960).

[7] 32 N.J. 358, 161 A.2d 69 (1960); 29 Fordham L. Rev. 183 (1960). For an indication of the impact of this decision on the commercial world see Wall Street Journal, Products on Trial, Aug. 31, 1960, p. 1, col. 1.

With the privity question occupying the center of the warranty stage, little attention has been devoted to other limitations imposed upon recovery in a warranty action. The purpose of this comment is to indicate other defenses available to a defendant being sued in warranty. The fact that the defenses to be herein discussed do exist, suggests that the use of the term "insurer" to define a vendor's liability is not completely accurate.

The area to be investigated focuses on the responsibility of a user of a product to meet a minimum standard of care. The theory basic to the following cases is that one cannot recover for injuries resulting from his own misconduct, and it is closely related to the maxim "volenti non fit injuria" which pervades the field of negligence. Similar to contributory negligence[11] as known in the law of torts, this doctrine negates a breach of warranty.

I

FAILURE TO ESTABLISH BREACH OF WARRANTY

Four types of cases are subsumed under this section: (1) those in which the plaintiff has failed to adduce sufficient evidence to prove his cause of action; (2) decisions denying recovery on the ground that the plaintiff had notice of the defect at the time he purchased the goods; (3) cases in which the defendant prevailed on the theory that the warranty did not extend to the use to which the goods were put by the plaintiff; and (4) holdings grounded on the theory that the plaintiff failed to prove a causal connection between the alleged defect and the event causing injury.

Failure of Proof.—A plaintiff in a warranty action must show something more than a sale followed by an injury. In *Brown v. Horowitz*[12] the court denied the buyer recovery for damage to his cab caused by the running away of a horse warranted to be "kind and sound in all harness, and good wind." The actual holding of the court is found in the statement, "We have, therefore, as the sole evidence of a breach of warranty, the *unexplained* fact that the horse ran away. This in our opinion was not sufficient in the face of the positive evidence of the horse's previous gentleness . . . [to support recovery]." [13] What the plaintiff's case lacked was evidence of the reason for the damage. There was a failure to connect the fact that the horse ran away with the supposition that this occurred because the animal was not gentle and safe. As a result the trier of facts could only speculate why the accident happened: was it because of faulty harnessing, improper driving or a defect in the animal?

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[8] Starke, *Implied Warranties of Quality and Wholesomeness in the Sale of Food,* 137 N.Y.L.J. Nos. 67–69, p. 4, col. 1 (1957). Parish v. Great Atl. & Pac. Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7 (N.Y.C. Munic. Ct. 1958); Conklin v. Hotel Waldorf Astoria Corp., 5 Misc. 2d 496, 161 N.Y.S.2d 205 (N.Y. City Ct. 1957).

[9] 235 N.Y. 468, 139 N.E. 576 (1923).

[10] It is interesting to note that the New Jersey court cited analogous New York cases to formulate its holding. 32 N.J. 358, 161 A.2d 69. See also Hart, *Commercial Law, 1958 Survey of New York Law,* 33 N.Y.U.L. REV. 1146, 1153–58 (1958). *But see* Hart, *Commercial Law, 1959 Survey of New York Law,* 34 N.Y.U.L. REV. 1442–47 (1959) where the cases discussed sustain the privity doctrine.

[11] The term is inappropriate in the warranty action because the defendant is strictly liable once the warranty is breached regardless of any negligence on his part.

[12] 35 Misc. 287, 71 N.Y. Supp. 702 (App. T. 1901).

Zampino v. Colgate-Palmolive Co.[14] presents a similar result. After applying a deodorant purchased from the defendant, the plaintiff suffered a contact dermatitis and sued for the resulting damage. The only medical evidence presented at the trial was the testimony of the plaintiff's doctor to the effect that it was his opinion that the condition resulted from the deodorant. The physician did not identify the ingredient in the product which caused the harm and he failed to state the exact source of the disorder. The court held that the plaintiff was entitled to no recovery, on the grounds, again, that there had been a failure to connect the product with the injury. As in the *Brown* case, the area for speculation by the jury was too broad: was the dermatitis caused by a deleterious ingredient, or was the plaintiff a hypersensitive individual, or, did the damage stem from an improper use of the product?

These cases demonstrate that a plaintiff in a warranty action must carry the burden of proof that a warranty was breached. They represent an understanding by the courts that a mere showing of a sale followed by an injury is insufficient and that the vendor, even in warranty, is not responsible for all the consequences flowing from the use of the product.

Notice of the Defect at the Time of Sale.—One of the essential elements in the warranty action is reliance by the purchaser upon the representations implied or expressed in the contract of sale. A seller will not be liable where the buyer is in an equal position to know the quality of the goods. The requirement of reliance has been codified in section 15(3) of the Uniform Sales Act:[15] "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

That the necessity of reliance stands as a definite restriction on the right of a buyer to recover in warranty is illustrated in the case of *200 East End Ave. Corp. v. General Elec. Co.*[16] There the buyer was suing for damages resulting from a failure of certain air conditioning equipment to operate as the seller had advertised. The court denied recovery on the ground that engineers employed by the plaintiff had full knowledge and understanding of the capacity of the units purchased, had in fact helped to select the equipment and knew or should have known in advance of installation that the equipment would not function properly. The court concluded that there could be no breach under such circumstances.

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[13] *Id.* at 288, 71 N.Y. Supp. at 703, 704. (Emphasis added.)

[14] 10 Misc. 2d 686, 173 N.Y.S.2d 117 (Sup. Ct. 1958), *rev'd on other grounds,* 8 App. Div. 2d 304, 187 N.Y.S.2d 25 (1959), *aff'd* 8 N.Y.2d 1069, — N.E.2d —, — N.Y.S.2d — (1960). See Uffner v. Campbell Soup Co., 207 Misc. 21, 138 N.Y.S.2d 728 (N.Y.C. Munic. Ct. 1954).

[15] N.Y. PERSONAL PROPERTY LAW § 96(3). N.Y. PERSONAL PROPERTY LAW §§ 93, 96(1), (UNIFORM SALES ACT §§ 12, 15(1)) are also pertinent.

[16] App. Div. 2d 415, 172 N.Y.S.2d 409 (1958), *aff'd,* 6 N.Y.2d 731, 158 N.E.2d 508, 185 N.Y.S.2d 816 (1959). See also Epstein v. John Mullins & Sons, Inc., 266 App. Div. 665, 40 N.Y.S.2d 212 (1943), *aff'd,* 292 N.Y. 535, 54 N.E.2d 381 (1944).

It should be emphasized that the buyer's knowledge at the time of sale is critical. Since a warranty is breached, if at all, at the time of the sale, recovery upon the theory under discussion can be precluded only if the the buyer has notice of the defective condition prior to the sale. However, where the defect is discovered subsequent to the sale the amount of recovery may be substantially limited by the doctrine of avoidable consequences [17] or may be precluded entirely upon grounds other than the Uniform Sales Act.[18]

A question arises whether a buyer is denied relief where he fails to avail himself of an opportunity to discover reasonably obvious defects before he purchases the goods. Although the Uniform Sales Act does not cover this situation, the common law of New York existing prior to its adoption did deny recovery in such cases and the present general rule is in accord.[19]

No Warranty as to the Method of Use.—The cases that fall within this classification raise the fundamental question of the scope of the warranty of merchantability. What constitutes the implied-in-law promise by the seller under section 15(2) of the Uniform Sales Act? [20] The meaning of the term "merchantable" is of the utmost importance. The cases indicate that the warranty extends only to a use of the product that is normally within the contemplation of the warrantor and where due care has been exercised by the vendee.

No implied warranty exists where the use giving rise to the alleged cause of action is merely incidental to the particular purpose of the product.[21] A fortiori, this principle applies where the use in question is completely foreign to the nature of the product. A striking example of the latter proposition is found in *Fredendall v. Abraham & Straus, Inc.*,[22] a case involving the sale of a dry cleaning fluid. On the container were cautionary statements and instructions warning against using the cleaner in a hot or poorly ventilated room. The plaintiff, however, cleaned some clothes in a small bathroom with little aeration and at a time when the temperature of the room was eighty-three degrees. Her husband remarked to her that "the odors were very strong and disagreeable." [23] The court of appeals dismissed the complaint with a short opinion stating: "We think the evidence conclusively shows that the plaintiff failed to use reasonable care in the use of the fluid and that this default was an essential cause of her illness." [24]

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[17] Standard Oil Co. v. Boyle, 237 App. Div. 471, 261 N.Y. Supp. 512 (1933); Razey v. J. B. Colt Co., 106 App. Div. 103, 94 N.Y. Supp. 59 (1905).

[18] See text accompanying note 38, *infra*.

[19] Bierman v. City Mills Co., 151 N.Y. 482, 45 N.E. 856 (1897) and Waeber v. Talbot, 167 N.Y. 48, 60 N.E. 288 (1901) have not been overruled. The Uniform Commercial Code states that, "when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired *or has refused to examine the goods* there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him." (Emphasis added.) UNIFORM COMMERCIAL CODE § 2–316(3)(b). The official comment to this section indicates that the seller is relieved only when he demands that the buyer make an inspection. Comment 8 to UNIFORM COMMERCIAL CODE § 2–316 (3)(b).

[20] N.Y. PERSONAL PROPERTY LAW § 96(2); UNIFORM SALES ACT § 15(2).

[21] Epstein v. John Mullins & Sons, Inc., 266 App. Div. 665, 40 N.Y.S.2d 212 (1943), *aff'd*, 292 N.Y. 535, 54 N.E.2d 381 (1944).

[22] 279 N.Y. 146, 18 N.E.2d 11 (1938).

An analogous decision is found in *Poretz v. R. H. Macy & Co.*,[25] where an action was brought to recover for damages incurred when the purchaser was injured while moving a chaise longue purchased from the defendant. Hurrying to pick up the chair, the plaintiff released the knob which controlled the adjustable position of the back rest. The chaise snapped into an upright position and seriously injured her hand. In denying recovery, the court made the following pertinent observation concerning the alleged warranty cause of action:

> When the hand is carelessly made to come into contact with the vital or focal point of danger of any mechanism . . . it is bound to become injured. The implied warranty of witness (*sic*) for use applies only to a usual or an apparent use intended and not against injury while carelessly handling the dangerous portions of the mechanism. Defendants did not warrant the chaise to be accident proof. No mechanical object, if used in a careless manner, can possibly be. . . . Liability for breach of warranty does not exist where the object functions properly for the purpose for which it was designed. . . . The defendants were not required to guard against hazards apparent to the plaintiff or protect her against injuries through her own patently careless and improvident conduct.[26]

Two other cases, highly informative when contrasted to one another, deserve mention. Both *McSpedon v. Kunz* [27] and *Eisenbach v. Gimbel Bros.*[28] involved the sale of raw pork allegedly infected with the parasite trichina. In the *McSpedon* case the plaintiff was a housewife who had contracted trichinosis from pork sold to her by the defendant. Plaintiff testified that she knew that pork should be well cooked and thought that she had done so. However, she knew nothing about trichinae nor had she any knowledge that the parasite is killed at a temperature of 134 degrees fahrenheit. Recovery was allowed. The *Eisenbach* case, decided two years later, involved a cross-complaint by a restaurateur against his supplier for the amount of a recovery allowed one of his patrons who contracted trichinosis from pork served in the restaurant. The court, taking cognizance of the experience and knowledge possessed by one whose business is the preparation of food, dismissed the complaint.

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[23] *Id.* at 148, 18 N.E.2d at 11.

[24] *Ibid.*

[25] 119 N.Y.S.2d 211 (Sup. Ct. 1953).

[26] *Id.* at 213.

[27] 271 N.Y. 131, 2 N.E.2d 513 (1936), *affirming* 245 App. Div. 824, 281 N.Y. Supp. 147 (1935).

[28] 281 N.Y. 474, 24 N.E.2d 131 (1939), *modifying* 256 App. Div. 903, 10 N.Y.S.2d 236.

Since there is no repudiation of the *McSpedon* case by the court in *Eisenbach,* the latter decision cannot be explained by reasoning that the court in the *Eisenbach* case held that there is no warranty that pork is free of the parasite and hence that no breach occurs when pork infected with trichinae is sold. Neither is "contributory negligence" a satisfactory explanation because of theoretical and etymological difficulties encountered when a negligence concept is applied in a warranty action, where stricter rules of liability are involved.[29]

Assuming that the court in both decisions held the sale of pork infected with trichinae to be a breach of the implied representation of wholesomeness, it may be argued that there is a legal breach only when the product is used properly. This raises the pivotal question of what is a proper use. It would seem that the answer lies in considering the proper use of the product to be relative to, and in a sense dependent upon, the user.

In *McSpedon* the plaintiff exercised reasonable care in preparing the pork because she utilized that degree of care which would be reasonably expected from a person in her circumstances, *i.e.,* one who has no knowledge of what constitutes adequate cooking. Hence, the use to which she put the product was a proper one. In *Eisenbach* the cross-complainant failed to exercise such care as is expected of one in the position of a chef and for this reason his use of the product was improper. Therefore, no breach of warranty occurred. In other words, the warranty of merchantability in the sale of fresh pork amounts to an implied representation that the pork will be free of disease-causing parasites if the pork is adequately cooked; but a plaintiff will be denied recovery because of improper culinary preparation only if he is or ought to be cognizant of what constitutes adequate preparation, *i.e.,* cooking sufficient to kill trichinae.

Proper use, not only in the trichinosis cases but in all warranty cases, therefore, becomes a relative term dependent upon the particular circumstances of the parties and the individual facts of each case. The conclusion may be drawn that the propriety of the use to which a product is put depends on how a reasonable person would utilize it. Although recovery is allowed only when it is shown that the plaintiff handled the product properly, the courts may expand or contract the extent of the warranty by interpreting what is reasonable under the facts presented.

Proximate Causation.—The doctrine of proximate cause plays a dual role in warranty actions. It is essential in establishing both the breach and the amount recoverable if a breach is proven. It is first necessary that a causal connection exist between the alleged defect and the event causing injury, and in addition, the damages for which recovery is sought must emanate from this same event. The cases to be discussed are concerned with the first aspect of causation where the missing link occurs between the defect and the damage-causing event.

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[29] See note 11, *supra.* See also DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 80, 193–94 (1951).

The buyer in *Kirchick v. Silverman*[30] was injured when a jar of applesauce which he was opening shattered in his hand. Recovery was denied by the court on the ground that the plaintiff showed no more than his injury, leaving it a matter of conjecture whether that injury had resulted from a latent defect. Such evidence was deemed insufficient to exclude other equally probable causes.

The extent to which causation may affect recovery in a warranty action is indicated in *Natale v. Pepsi-Cola Co.*,[31] where the plaintiff attempted to recover for injuries resulting from a bottle which burst while he was opening it on a gate hasp. The court stated, in regard to the exclusion of certain evidence tending to negate the causal connection between the alleged defect and the injurious event:

> On the issue of liability, we hold the court's charge to be too narrow since it eliminated from the jury's consideration the effect of the handling of the bottle between the time of purchase and the time of the occurrence. The charge concerned itself entirely with the handling of the bottle by the infant plaintiff immediately prior to the occurrence. However, there was evidence of the manner of its handling between the time of purchase and immediately prior to the occurrence which should have been submitted to the jury together with a charge conveying to them the fact that if . . . *the essential cause of the occurrence was something other than the breach of the implied warranty,* no matter what, the defendant is not liable.[32]

The reasoning expressed in this passage imposes a broad limitation on warranty actions and will, if followed, become an important hurdle if a cause of action against persons other than the immediate vendor should be recognized in New York. The core of the court's position is that the defendant is liable only where the incident giving rise to the complaint is causally related to a defective product. Traditionally, a plaintiff has been required to carry the burden of proving each element of his cause of action, which means that he is obliged to establish the necessary causal relationship. Where an action is commenced against a party not in privity with the plaintiff, this requirement, difficult to meet between the immediate parties to the contract of sale, will be even more onerous.

To apply with consistency the doctrine of proximate causation, the whole history of the product from the time it leaves the defendant's hands until the injury occurs would become a vital part of the plaintiff's case and his would be the task to establish not only the existence of a defect at the time of the initial sale but to trace the causal links the entire length of the chain of distribution.[33] Although every possible cause other than the alleged breach of warranty need not be excluded, the plaintiff would be required to present enough proof to raise a question of fact as to whether the defendant's act was a substantial producing cause sufficient to impose strict liability upon him. The difficulty inherent in the plaintiff's task suggests that the truly effective limitation on caveat venditor lies in a strict application of the doctrine of proximate causation.[34]

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[30] 76 N.Y.S.2d 75 (N.Y. City Ct. 1947).

[31] 7 App. Div. 2d 282, 182 N.Y.S.2d 404 (1959).

[32] *Id.* at 283, 284, 182 N.Y.S.2d at 406, 407. (Emphasis added.)

[33] Res ipsa loquitur would be of little help to the plaintiff to establish a prima facie case for breach of warranty because under this doctrine the plaintiff must also exclude probable causes other than the act of the defendant as well as establish that the product is in the exclusive control of the defendant. See Jacobs v. Childs, 166 N.Y. Supp. 798 (N.Y.C. Munic. Ct. 1916).

II

EXPANDING THE FIELD: DIRECTIONS AND WARNINGS

Several cases indicate that the seller may broaden the defenses discussed by warning that his product has a potentially harmful nature and by specifying the correct procedure to follow. The purchaser could not then consider the product defective by reason of the harmful qualities brought to his attention since he has been given notice [35] and since the effects to be expected from the use of the product other than as directed are rendered patent. In addition, the responsibility for proper use placed upon the buyer is increased.

The courts of New York early recognized that the buyer must follow advice given by the seller in order to recover on the warranty. In *Smith v. Borst* [36] the buyer sued for breach of an express warranty that the swelling on the leg of the horse sold would heal if a specified remedy was employed. Evidence was offered by the seller that when the leg failed to heal, the buyer consulted a farrier who suggested a different treatment. This evidence was introduced by the seller to show that the farrier's advice should have been followed since it was a more effective remedy. The buyer was permitted to explain in rebuttal by offering a self-serving declaration why he had not followed this method. The evidence was held admissible as a statement of the buyer's legal duty and as an explanation of what might be erroneously charged as negligence in not adopting a more efficient cure. In order to come within the terms of the seller's warranty, then, the plaintiff was bound to treat the leg as the seller recommended and had an excuse for not following the farrier's method because this "might hazard the effect of his warranty." [37]

Among the reasons assigned for holding the defendants liable in the *McSpedon* case [38] was the fact that although the defendants were cognizant of the danger involved when insufficiently cooked pork is consumed, they marketed their pork without notice that it was not treated and without a word of caution that the meat must be cooked at a certain temperature for a specific length of time. Since many people were using reasonable care but employing an insufficient cooking method through ignorance, it was implied that the defendant could raise the inadequate cooking standard by informing the public and the buyer would then be held to this standard.

One of the most impressive examples of the fact that the failure to follow directions patently displayed on the product will bar a cause of action is the *Fredendall* case,[39] where flagrant violation of the suggested precautions on a cleaning fluid container conclusively established a lack of due care.

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[34] Wilson, *Products Liability*, 43 CALIF. L. REV. 809, 840 (1955).

[35] See text at notes 15–19 *supra*.

[36] 63 Barb. 57 (N.Y. Sup. Ct. 1871).

[37] *Id.* at 59.

[38] 271 N.Y. 131, 2 N.E.2d 513 (1936), *affirming* 245 App. Div. 824, 281 N.Y. Supp. 147 (1935).

The preceding cases involved the defense that the plaintiff had notice imparted by directions and warnings issued prior to or simultaneously with the purchase. A further aspect of the use of notice by a defendant in a warranty action to exonerate himself from liability concerns notification of the buyer after the consummation of the sale. In *Nishida v. E. I. DuPont DeNemours & Co.*,[40] a warning letter issued by the defendant after the sale of a defective chemical to a processor broke the sequence of liability between the breach of warranty by the defendant and the plaintiff's damage. Although the court stated that defendant was liable until he notified the processor, the sale by the latter to the plaintiff's seller subsequent to the warning was an intervening efficient cause for which the processor alone was answerable.

The point conveyed by these cases is clear. As recovery on the implied warranty of merchantability is not permitted when a defect is patent, the seller can make potential defects patent by drawing attention to them. Similarly, use of an obviously dangerous product with knowledge of the danger is at the risk of the user. It would seem, however, that the courts will require notification that is reasonably apparent and instructive before the seller can successfully defend on the ground that the buyer has been warned. A mere listing of ingredients will probably not be sufficient.[41] Furthermore, the seller will have to take into account the understanding and knowledge of the average user of his wares.

III

CONCLUSION

While the current trend of thought as reflected in judicial opinions seems to indicate that the defensive barriers surrounding the warranty action are being eroded, there remains a body of decisional law experiencing a development in a different direction. The principles derived from the warranty cases discussed in this comment indicate that a fund of defenses is available to the vendor or manufacturer of chattels. The courts of New York are as yet unwilling, in terms of liability, to equate "warranty" with "insurance" or to change the underlying basis of the common law of sales from caveat emptor to caveat venditor.

A. RITA CHANDELLIER

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[39] 279 N.Y. 146, 18 N.E.2d 11 (1938).

[40] 245 F.2d 768 (5th Cir. 1957). See also Halpern v. Jad Constr. Corp., 202 N.Y.S.2d 945 (Sup. Ct. 1960).

[41] Zampino v. Colgate-Palmolive Co., 10 Misc. 2d 686, 173 N.Y.S.2d 117 (Sup. Ct. 1958), *rev'd on other grounds*, 8 App. Div. 2d 304, 187 N.Y.S.2d 25 (1959), *aff'd*, 8 N.Y.2d 1069, — N.E.2d —, — N.Y.S.2d — (1960).

CLASSIFICATION OF PROPERTY IN NEW YORK FOR PURPOSES OF REAL PROPERTY TAXATION

A problem repeatedly troubling courts and local assessors lies in determining what constitutes real property for purposes of taxation. Since the real property tax is the cornerstone of the fiscal structure of local government in New York,[1] the characterization of property as real or personal property obviously is of prime importance to municipalities.

In determining whether a particular item of property is taxable as real property, local assessors and the courts are aided by a statute which defines real property.[2] While such legislative fiat in defining property resolves many uncertainties that assessors and courts would otherwise face,[3] it has not sufficed to resolve all problems of classification for tax purposes. For example, under the statute, real property includes "other articles and structures . . . erected upon, under or above the land, or affixed thereto . . . ."[4] How inclusive are the terms "articles" and "structures," and what is the meaning of the phrase "erected upon, under or above the land, or affixed thereto"? It is apparent that the assessor must seek guidance beyond the language of the statute in seeking an answer.

It is the purpose of this comment to discuss the applications of the statutory provisions classifying real property for tax purposes. Special attention will be focused on solutions to questions of classification that affect the determinations of local assessors[5] in relation to borderline areas of real property taxation and to those problems of classification that particularly affect the fiscal structure of municipalities.

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[1] Real property taxes levied in fiscal year 1959 by local taxing authorities totaled more than 1.9 billion dollars, by far the largest single source of municipal revenue. N.Y. Leg. Doc., 1959, No. 116, p. 5 (Annual Report of the State Tax Commission.) The abolition of the personal property tax by N.Y. Sess. Laws 1933, ch. 470 has increased the importance of real property taxes levied by municipalities. At the present time ad valorem taxation of personal property is prohibited by N.Y. Real Property Tax Law § 300. N.Y. Const. art. XVI, § 3 prohibits the ad valorem taxation of intangible personal property.

[2] N.Y. REAL PROPERTY TAX LAW § 102(12), (17) (formerly N.Y. TAX LAW §§ 2(6)-(6-a), 3). The repeal of N.Y. Tax Law § 2(6)-(6-a) and the last two sentences of N.Y. Tax Law § 3 and their re-enactment in N.Y. Real Property Tax Law § 102(12) were not intended to effectuate any change in the provisions of those sections in relation to the classification of property as real or personal property. N.Y. REAL PROPERTY TAX LAW § 1602(5).

[3] For instance, trees and undergrowth are specifically included within the term "real property." N.Y. REAL PROPERTY TAX LAW § 102(12)(a). So far as assessments are concerned, such a specification renders moot the familiar question whether trees are real estate or personalty.

[4] N.Y. REAL PROPERTY TAX LAW § 102(12)(b).

[5] Local assessors do not assess all real property subject to taxation for local purposes. The State Board of Equalization and Assessment assesses "special franchises." N.Y. REAL PROPERTY TAX LAW § 202. For purposes of assessment and taxation a "special franchise" includes the value of tangible property situated in, under, above, upon or through any public place used in connection therewith. Property of a municipality or special district is exempted. N.Y. REAL PROPERTY TAX LAW § 102(17).

CONSTITUTIONAL CONSIDERATIONS: APPLICATION TO TRAILERS

A fundamental question in the area of real property taxation concerns the extent of the power of a legislature to define what is and what is not real property for tax purposes. In New York, a 1954 statute adding trailers to the definition of the terms "real property," "property" or "land" [6] directly presented the constitutional question. Essentially the statute declared occupied trailers located within the boundaries of a tax district for sixty days or more to be taxable real property and assessable to the owner of the real property on which they were located.[7] Prior to the 1954 statute, trailers or mobile homes had escaped the imposition of a real property tax. Taxes levied upon them were declared void on the ground that trailers were not real property within the then existing provisions of the Tax Law.[8]

Although a need appears for a tax to apportion the financial burden placed on certain municipalities as a result of the influx of the trailer population,[9] there has been no unanimity of opinion among the courts which have considered the question of the power of the legislature to impose the tax in the manner prescribed by the statute.[10] In three cases, *New York Mobile Homes v. Steckel,*[11] *Feld v. Hanna* [12] and *Beagell v. Douglas,*[13] the courts have upheld the constitutionality of the trailer tax, while in two other cases, *Barnes v. Gorham* [14] and *New York State Trailer Coach Ass'n v. Steckel,*[15] the tax has been struck down as denying to state citizens due process of law and the equal protection of the laws guaranteed by both federal and state constitutions.

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[6] N.Y. Sess. Laws 1954, ch. 726.

[7] Substantially embodied in N.Y. Real Property Tax Law § 102(12)(g).

[8] Erwin v. Farrington, 285 App. Div. 1212, 140 N.Y.S.2d 379 (1955); Stewart v. Carrington, 203 Misc. 543, 119 N.Y.S.2d 778 (Sup. Ct. 1953). In the latter case it is interesting to note that the court suggested that legislation was the proper recourse to pursue to bring trailers within the class of taxable real property.

[9] "More and more, families in our state, either due to occupations which require the head of the family to move from place to place or as an economy move, are now residing in so-called house trailers. These families have children who are being educated in our schools and also demand police and fire protection, use our highways, courts and other governmental services. Present law does not provide an adequate means whereby these individuals may be assessed so that they pay their fair share of real estate taxes." Memorandum of Senator Anderson, 1954 N.Y. Leg. Annual 306.

[10] N.Y. Sess. Laws 1954, ch. 726 (now N.Y. REAL PROPERTY TAX LAW § 102(12)(g)).

[11] 12 Misc. 2d 761, 176 N.Y.S.2d 482 (Sup. Ct. 1958), *modified,* 11 App. Div. 2d 595, 201 N.Y.S.2d 595 (1960). In a memorandum opinion the appellate division, fourth department, upheld the conclusion of the trial court that the statute was constitutional. Since the action was for a declaratory judgment, the appellate division concluded that the complaint should not have been dismissed by the trial court. The judgment and order were modified to strike therefrom the provisions that the complaint be dismissed, and as so modified, the judgment was affirmed.

[12] 4 Misc. 2d 3, 158 N.Y.S.2d 94 (Sup. Ct. 1955).

[13] 2 Misc. 2d 361, 157 N.Y.S.2d 461 (Sup. Ct. 1955).

[14] 12 Misc. 2d 285, 175 N.Y.S.2d 376 (Sup. Ct. 1957).

[15] 208 Misc. 2d 308, 144 N.Y.S.2d 82 (Sup. Ct. 1955), *rev'd on other grounds,* 3 App. Div. 2d 643, 158 N.Y.S.2d 179 (1956).

The issues which are determinative of the constitutionality of the 1954 statute imposing a real property tax on trailers are of fundamental importance in the field of real property taxation. The issues are: (1) May the legislature classify as real property for tax purposes something which normally is considered movable personal property? (2) May a legislature by defining and classifying a trailer as real property impose a tax on the owner of land on which the trailer is located, such tax being measured by the value of the trailer?

In answering the first question in the negative, the justices in the *New York State Trailer Coach Ass'n* and *Barnes* cases argued that the legislature is limited in its power to declare that property which is ordinarily considered personal property shall be real property for tax purposes, especially where such property has none of the qualities normally incident to real estate.[16] On the same question, in upholding the constitutionality of the trailer tax, the justices in the *New York Mobile Homes, Feld* and *Beagell* cases asserted that what should be considered real property for tax purposes is a matter within the province of the legislature and the legislature alone—a position which the New York courts have repeatedly adopted.[17]

The Supreme Court of the United States recognizes the constitutional power of the state to select and classify property for tax purposes.[18] Although such power is not unfettered, its scope is extremely broad. The only limitations imposed upon the power under the fourteenth amendment are that it must be exercised on a rational or reasonable basis [19] and must not be clearly discriminatory.[20] The highest judicial tribunal in New York has placed no greater restriction on such power. In *People ex rel. Hatch v. Reardon,*[21] the court, speaking of the taxing power of the legislature, declared:

> There is no express restriction upon this power in our State Constitution and no implied restriction, except by the primary guaranties relating to life, liberty, property and due process of law. . . . Subject to these restraints, the legislature has supreme control of the power to tax, and its

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[16] See Sellin, *State and Local Taxation, 1958 Survey of N.Y. Law,* 33 N.Y.U.L. Rev. 1120 (1958) in which the commentator supports the position that the legislature can not convert movable personal property into real estate for tax purposes.

[17] Genet v. City of Brooklyn, 99 N.Y. 296, 1 N.E. 777 (1885); New York Tel. Co. v. Ferris, 257 App. Div. 415, 13 N.Y.S.2d 359 (1939); Holmes Elec. Protective Co. v. Chambers, 1 Misc. 2d 990, 125 N.Y.S.2d 436 (Sup. Ct. 1953); Interstate Lien Corp. v. Schmidt, 180 Misc. 910, 44 N.Y.S.2d 709 (Sup. Ct. 1940). See also Wagner v. Mallory, 169 N.Y. 501, 62 N.E. 584 (1902).

[18] Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1939); Home Ins. Co. v. New York, 134 U.S. 594 (1889).

[19] Carmichael v. So. Coal & Coke Co., 301 U.S. 495 (1937); Memphis & C. Ry. v. Pace, 282 U.S. 241 (1931); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32 (1928).

[20] Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928); Citizens Tel. Co. v. Fuller, 229 U.S. 322 (1913).

[21] 184 N.Y. 431, 77 N.E. 970 (1906), *aff'd,* 204 U.S. 152 (1907); see Fort Hamilton Manor Inc. v. Boyland, 4 N.Y.2d 192, 149 N.E.2d 856, 173 N.Y.S.2d 560 (1958); Grumman Aircraft Eng'r Corp. v. Board of Assessors, 2 N.Y.2d 500, 141 N.E.2d 794, 161 N.Y.S.2d 393, *cert. denied,* 355 U.S. 814, *rehearing denied,* 355 U.S. 885 (1957).

action, even if arbitrary, discriminating and unreasonable, is binding upon all persons and property within the boundaries of the state.[22]

The statute classifying occupied trailers located within the boundaries of a tax district for sixty days or more as real property for tax purposes readily meets a requirement of reasonableness. To maintain that the legislature has acted unreasonably in subjecting such trailers to a real property tax is to ignore the fact that a trailer when connected to water, electric and sewer facilities is intended to be used as a dwelling place.

The decisions in the *New York State Trailer Coach Ass'n* and *Barnes* cases were based partly on the premise that trailers or mobile homes cannot be taxed as real property because they lack the characteristic of "permanency." [23] In an analogous situation, however, the court of appeals has expressly recognized that buildings which are erected on land by a lessee and removable by him at the expiration of the term may be assessed as real estate since the legislature specifically included buildings within the definition of taxable real property.[24] That the legislature has proceeded similarly by subjecting trailers or mobile homes to a real property tax seems not unreasonable.

The second issue—whether the legislature may impose a real property tax on the owner of the real property on which the trailer rests—poses a more perplexing problem. While the justices in the *New York State Trailer Coach Ass'n* and *Barnes* cases were willing to concede the power of the legislature to impose a personal property tax on the trailer owners, they nevertheless objected to a real property tax assessed against the owner of the land on which the trailer rested. The objection was based partly on dictum contained in *Hoeper v. Tax Comm'n*,[25] an income tax case, to the effect that a state statute measuring a tax on the property or income of one person by reference to the property or income of another violates the due process and equal protection clauses of the fourteenth amendment.[26] However, the New York courts have imposed no such limitations in real property tax cases. Although such courts recognize that the ownership of buildings or structures erected on land and the ownership of the land itself may be separately assessed under specified circumstances,[27] they have not imposed a requirement that the local taxing authorities may not, if they so choose, assess the landlord for the value of the buildings or structures erected by the tenant.

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[22] 184 N.Y. at 444, 77 N.E. at 973; see People *ex rel.* Farrington v. Mensching, 187 N.Y. 8, 79 N.E. 884 (1907); Genet v. City of Brooklyn, 99 N.Y. 296, 1 N.E. 777 (1885). For cases in other jurisdictions upholding the power of a legislature to classify property as real or personal, see Johnson v. Roberts, 102 Ill. 655 (1882); Missouri, K. & T. Ry. v. Miami County Comm'rs, 67 Kan. 434, 73 Pac. 103 (1903).

[23] *But cf.* Corning v. Town of Ontario, 204 Misc. 38, 121 N.Y.S.2d 288 (Sup. Ct. 1958) where the application to trailers of a municipal zoning ordinance restricting a town's residental buildings to a prescribed footage was upheld.

[24] People *ex rel.* Hudson River Dayline v. Franck, 257 N.Y. 69, 177 N.E. 312 (1931). Buildings are specifically made taxable by N.Y. Real Property Tax Law § 102(12)(b).

[25] 284 U.S. 206 (1931). The Supreme Court struck down a statute, Wis. Sess. Laws 1931, ch. 448, § 3, authorizing the assessment of a tax against plaintiff-husband computed on the combined total of the separate incomes of the plaintiff and his wife, where the amount assessed exceeded the sum of taxes which would have been due if the incomes had been assessed separately.

[26] The court in New York Mobile Homes v. Steckel, 12 Misc. 2d 761, 176 N.Y.S.2d 482 (Sup. Ct. 1958), *modified,* 11 App. Div. 2d 595, 201 N.Y.S.2d 595 (1960), suggested situations where valuations made by assessors are to some degree determined by reference to the property of another, situations in which it does not appear that the Supreme Court intended the *Hoeper* case to apply. For example, the court suggested that where a

On the contrary, in *People ex rel. Herzog v. Miller,*[28] a case which presents a striking parallel to the trailer cases, the court upheld an assessment to the landlord of the value of a lunch wagon erected by his tenant on a brick foundation and connected with sewer, water, gas and electric facilities. While recognizing that as between the landlord and the tenant the lunch wagon remained personal property and was removable by the tenant at the expiration of the lease, the court held that so long as it remained on the land it was assessable to the landlord as real property.[29] The question whether the lunch wagon was assessable to the tenant was not considered.[30]

A further step was taken in *Interstate Lien Corp. v. Schmidt*[31] in which the court concluded that buildings, equipment and improvements used in the operation of a gasoline filling station were taxable as real property and that such property could be sold to satisfy delinquent taxes of the landlord even though it had been assessed to the landlord and not the tenant-owner of the fixtures.

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landowner rents his land for occupation by trailers or mobile homes, the assessed valuation of the land normally would be increased even in the absence of statute because of the increased productivity of the land in the nature of rentals. And in large metropolitan areas buildings of great value erected on leased lands are assessed to the lessor. As a practical consideration, a requirement that the assessor inquire into every leasehold would place an overwhelming burden upon the assessor. The trailer court owner can easily protect himself by setting his rentals at amounts which will compensate for taxes.

[27] In People *ex rel.* Van Nest v. Comm'rs, 80 N.Y. 573 (1880), it was held that an assessment was proper against a lessee bank under a lease which gave the lessor an option, at the expiration of the lease, to pay the value of the building or to renew the lease for a further term, the lessee being entitled to remove the building at the expiration of the renewed term. It has also been held that although the land on which improvements stand is exempt from taxation, such improvements may be assessed against the lessee provided that he has the right of removal at the end of the term. Fort Hamilton Manor, Inc. v. Boyland, 4 N.Y.2d 192, 149 N.E.2d 856, 173 N.Y.S.2d 560 (1958); People *ex rel.* Hudson River Day Line v. Franck, 257 N.Y. 69, 177 N.E. 312 (1931).

[28] 170 Misc. 1063, 11 N.Y.S.2d 572 (Sup. Ct.), *aff'd,* 258 App. Div. 724, 15 N.Y.S.2d 141 (1939).

[29] Where a lessee has no right to remove the building or structure, his interest is not taxable as a separate unit. People *ex rel.* Int'l Nav. Co. v. Barker, 153 N.Y. 98, 47 N.E. 46 (1897); Haas v. Board of Assessors, 109 N.Y.S.2d 527 (Sup. Ct. 1951).

[30] Under similar facts in a Massachusetts case in which a proceeding had been brought to foreclose rights of redemption under a tax title, it was held that a lunch cart standing on its own wheels upon cement abutments was property assessable as part of the real estate. Franklin v. Metcalfe, 307 Mass. 386, 30 N.E.2d 262 (1940).

[31] 180 Misc. 910, 44 N.Y.S.2d 709 (Sup. Ct. 1943); see Becker v. Borough of Little Ferry, 125 N.J.L. 141, 14 A.2d 493 (Sup. Ct. 1940), *aff'd,* 126 N.J.L. 330, 19 A.2d 657 (Ct. of Errors 1941). See also Waters & Co. v. Gerard, 189 N.Y. 302, 82 N.E. 143 (1907); Spencer v. McCowen, 13 Wend. 256 (N.Y. Sup. Ct. 1835).

The practical problems which might arise in the application of the trailer tax were a source of special concern to the courts in the *New York State Trailer Coach Ass'n* and *Barnes* cases. As illustrative of the argument that the tax statute could not be fairly administered, the courts suggested that the owner of a trailer which had been parked for fifty-eight days in one trailer park preceding the taxable status date [32] might move the trailer to another trailer park in the same district and thus subject the trailer to taxation as part of the realty of the second trailer park on the taxable status date. Under such circumstances the owner of the first trailer park on which the trailer rested for fifty-eight days would bear no portion of the tax. The countervailing argument is that the courts will not anticipate the unconstitutional application of a legislative act as a basis for holding it unconstitutional, but will apply the presumption that the statute will be fairly administered.[33] The possibility that an instance of inequality or unfairness may arise as a result of the application of the tax statute does not require that the statute be declared unconstitutional. The aggrieved party would clearly have a remedy under the Real Property Tax Law.[34]

Measured by the standards required by the Supreme Court and the courts of New York, the 1954 statute subjecting occupied trailers located within a tax district for sixty days or more to be taxable real property and assessable to the owner of the land on which they are located [35] should be considered a valid exercise of the power of the state to tax property within its borders.

SPECIFIC PROPERTY ASSESSABLE AS REAL PROPERTY

A statutory enumeration of specific property as real property for purposes of taxation frequently serves to obviate many difficulties and controversies which those entrusted with the administration of the real property tax would otherwise encounter. In some instances the singling out of specific items of property for special treatment may be merely declaratory of the common law, while in other instances property previously considered personalty is brought within the reach of the municipal taxing power. A disadvantage of this type of statute is that such singling out of property for taxation may result in application by the courts of the maxim *expressio unius est exclusio alterius,* which would exclude from the operation of the statute defining real property those items of property not specifically enumerated. The refusal by the courts to permit the assessment of trailers [36] prior to the 1954 statute [37] is illustrative of the application of such a rule of statutory construction.

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[32] The taxable status of real property in cities and towns of the state is determined annually as of June 1. N.Y. REAL PROPERTY TAX LAW § 302.

[33] United States v. Petrillo, 332 U.S. 1 (1946); Minnesota v. Probate Court, 309 U.S. 270 (1931).

[34] In the event that the statute taxing trailers should be unfairly applied, the taxpayer may attack the validity of the assessment under N.Y. Real Property Tax Law art. 7.

[35] The value of the trailer is now included in the assessment of the land. N.Y. REAL PROPERTY TAX LAW § 102(12)(g).

[36] Cases cited note 8 *supra.*

[37] N.Y. Sess. Law 1954, ch. 726 (now N.Y. REAL PROPERTY TAX LAW § 102(12)(g)).

In addition to the specific property previously discussed, "real property," "property" or "land" for real property tax purposes in New York also includes:

(1) Land both above and under water; mines, minerals, quarries and fossils in and under the land, except mines belonging to the state;[38]

(2) Bridges, wharves and piers and the value of the right to collect wharfage, cranage or dockage thereon;[39]

(3) Surface, underground or elevated railroads, and railroad structures, substructures and superstructures, tracks and the metal thereon, branches, switches and other fixtures authorized to be placed in, upon, above or under any public or private street or place;[40]

(4) Telephone and telegraph lines, wires, poles and appurtenances; supports and inclosures for electrical conductors and other appurtenances, upon, above and under ground;[41]

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[38] N.Y. Real Property Tax Law § 102(12)(a). Where an easement is carved out of one tenement for the benefit of another, the assessments should be made on the basis of the increase in the market value of the dominant estate and the decrease in value of the servient estate. Tax Lien Co. v. Schultze, 213 N.Y. 9, 106 N.E. 751 (1914); see People *ex rel.* Topping v. Purdy, 143 App. Div. 389, 128 N.Y.S. 569, *aff'd,* 202 N.Y. 550, 95 N.E. 1137 (1911).

[39] N.Y. Real Property Tax Law § 102(12)(b). A "bulkhead" is a "wharf" within the meaning of that term, but "bulkhead rights" are incident to and part of the wharf and pier and cannot be independently taxed. Matter of City of New York (Harlem R. Drive), 199 Misc. 281, 102 N.Y.S.2d 360 (Sup. Ct. 1951), *rev'd on other grounds,* 280 App. Div. 787, 113 N.Y.S.2d 917 (1952), *aff'd,* 305 N.Y. 624, 111 N.E.2d 737 (1953). Wharves and piers built upon a public street were taxable before being specifically designated as real property for tax purposes. People *ex rel.* Smith v. Comm'rs of Taxes, 10 Hun 207 (N.Y. Sup. Ct. 1877); *accord,* Smith v. The Mayor, 68 N.Y. 552, (1877); see Bridge Co. v. Patterson, 74 N.Y. 365, (1878) (toll bridge over a navigable river); Matter of Albany & Bethlehem Turnpike, 94 App. Div. 509, 87 N.Y. Supp. 1104 (1904) (bridges, culverts, ditches and prepared roadbed of a turnpike company).

[40] N.Y. Real Property Tax Law § 102(12)(c); People *ex rel.* Lehigh Valley Ry. v. Woodworth, 296 N.Y. 288, 73 N.E.2d 26 (1947) (bridge erected by railroad corporation on its own land); People *ex rel.* New York & H.R.R. v. Comm'rs of Taxes, 101 N.Y. 322, 4 N.E. 127 (1887) (tunnel and its incidental structures); People *ex rel.* New York Elevated R.R. v. Comm'rs of Taxes, 82 N.Y. 459 (1880) (foundation, columns and superstructure of an elevated railroad); People *ex rel.* Dunkirk & F.R.R. v. Cassity, 46 N.Y. 46 (1871) (tracks of railroad corporation consisting of stringers, ties and rails); Matter of New York Cent. R.R., 255 App. Div. 112, 6 N.Y.S.2d 121 (1938), *aff'd,* 280 N.Y. 658, 20 N.E.2d 1017 (1939) (abutments, piling, station platforms, tracks and structures); People *ex rel.* Erie Ry. v. Beardsley, 52 Barb. 105 (N.Y. Sup. Ct. 1868), *aff'd,* 41 N.Y. 619 (1870) (perpetual easement). The rolling stock and equipment of a railroad corporation is not taxable real property. People *ex rel.* Dexter Sulphite Pulp & Paper Co. v. Hughes, 246 N.Y. 35, 157 N.E. 922, *motion for reargument denied,* 246 N.Y. 539, 159 N.E. 642, *motion to amend remittitur granted,* 247 N.Y. 576, 161 N.E. 189 (1928). *Compare* People *ex rel.* New York, O. & W. Ry. v. Tax Comm'rs, 215 N.Y. 434, 109 N.E. 547 (1915) (special franchise assessment), with People *ex rel.* Lehigh Valley Ry. v. Woodworth, *supra.* Bulk milk tanks installed upon a farm to hold milk awaiting shipment to market are not real property for tax purposes. N.Y. Real Property Tax Law § 102(12)(b).

[41] N.Y. Real Property Tax Law § 102(12)(d). While the term "telephone" has been added in the recodification, the courts had already construed "telegraph" as contained in former N.Y. Tax Law § 2(6) to embrace "telephone." Holmes Elec. Protective Co. v. Williams, 228 N.Y. 407, 127 N.E. 315 (1920); New York Tel. Co. v. Ferris, 257 App. Div.

(5) Mains, pipes and tanks authorized to be made, laid or placed in upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product which may be transported, conveyed or protected thereby.[42]

ARTICLES AND STRUCTURES ERECTED UPON, UNDER OR ABOVE THE LAND OR AFFIXED THERETO

Probably the most perplexing question confronting the courts and the local assessors in determining the taxability of property stems from the specification of "articles and structures . . . erected upon, under or above the land, or affixed thereto" as real property for purposes of taxation.[43] While an assessor can readily determine that property such as land,[44] quarries,[45] buildings,[46] piers,[47] railroad tracks[48] and telephone lines[49] should be entered on the assessment roll, his task becomes more difficult when he is required to determine whether an article or structure has lost its chattel character so as to become real property for tax purposes.

In deciding whether an article or structure has become a fixture for tax purposes, some New York courts have maintained that the common

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415, 13 N.Y.S.2d 359 (1939), *aff'd,* 282 N.Y. 667, 26 N.E.2d 805 (1940); New York Tel. Co. v. New York, 169 App. Div. 310, 154 N.Y. Supp. 1059 (1915), *aff'd,* 218 N.Y. 738, 113 N.E. 1061 (1916). The courts have not adopted a strict construction of the words "telephone and telegraph lines, wires, poles and appurtenances." Thus, it has been held that an electrical alarm system is embraced within the statutory definition. People *ex rel.* Holmes Elec. Protective Co. v. Chambers, 1 Misc. 2d 990, 125 N.Y.S.2d 436 (Sup. Ct. 1953), *aff'd,* 285 App. Div. 886, 139 N.Y.S.2d 245 (1955), *aff'd,* 1 N.Y.2d 760, 135 N.E.2d 584, 152 N.Y.S.2d 304 (1956). Similarly, the office equipment of a telephone company constitutes taxable real property. New York Tel. Co. v. Ferris, *supra.* The ordinary telephone instruments together with the bell box and connecting wires and manually operated switchboards on the premises of a telephone company's subscribers are subject to local assessment and taxation. Matter of New York Tel. Co. (Canough), 290 N.Y. 537, 49 N.E.2d 999, *motion for reargument denied,* 291 N.Y. 648, 51 N.E.2d 931, *motion to amend remittitur denied,* 291 N.Y. 709, 52 N.E.2d 595 (1943); see People *ex rel.* New York Tel. Co. v. Taylor, 187 Misc. 550, 64 N.Y.S.2d 326 (Sup. Ct. 1946). See also People *ex rel.* Upstate Tel. Corp. v. Eaton, 185 Misc. 396, 57 N.Y.S.2d 50 (Sup. Ct. 1945). It has also been determined that the statutory definition is not restricted to companies engaged in the commercial telephone or telegraph business. People *ex rel.* Holmes Elec. Protective Co., *supra* at 997.

[42] N.Y. REAL PROPERTY TAX LAW § 102(12)(e). Gas mains and pipes laid in public thoroughfares were not taxable real property under the common law. Chelsea Waterworks Co. v. Bowley, 20 L.J.Q.B. 520 (Eng. 1851). Before 1881 such property was not taxable in New York since it was not real estate as defined by statute. People *ex rel.* Citizens' Gas-Light Co. v. Board of Assessors, 39 N.Y. 81 (1868); see Buffalo Gas Co. v. Volz, 31 Misc. 160, 64 N.Y. Supp. 534 (Sup. Ct. 1900). In 1881 the law was amended to include such property within the definition of "land" or "real estate." N.Y. Sess. Laws 1881, ch. 293; see Herkimer County Light & Power Co. v. Johnson, 37 App. Div. 257, 55 N.Y. Supp. 924 (1899). See also Matter of City of New York (Gillen Place), 304 N.Y. 215, 106 N.E.2d 897 (1952).

[43] N.Y. REAL PROPERTY TAX LAW § 102(12)(b).

[44] N.Y. REAL PROPERTY TAX LAW § 102(12)(a).

[45] *Ibid.*

[46] N.Y. REAL PROPERTY TAX LAW § 102(12)(b).

[47] *Ibid.*

[48] N.Y. REAL PROPERTY TAX LAW § 102(12)(c).

[49] N.Y. REAL PROPERTY TAX LAW § 102(12)(d).

law rules defining fixtures will not be considered since the standard created by the statute[50] must govern.[51] Such a statement, however, is misleading. Even a cursory examination of New York real property tax cases will disclose that when confronted with a fixture question, many courts, as a basis for their decisions, have relied upon non-tax cases and the rules enunciated by such cases.[52]

Unfortunately, from the position of both the taxpayer and the municipalities, the New York courts have not developed any standard capable of uniform application for determining the taxability of annexed property. The leading American case concerning fixtures, *Teaff v. Hewitt*,[53] laid down a three-fold test in determining the legal character of annexed property: (1) actual annexation to the realty or something appurtenant thereto; (2) appropriation to the use or purpose of the realty with which it is connected; and (3) intention of the party making the annexation to make the article a permanent accession to the freehold.[54] At an early date the court of appeals adopted such requisites in several non-tax cases,[55] and at the same time asserted that motive and intention, and not the manner or method of affixation, are the overriding considerations in determining the permanency of the annexation.

An early tax case, *People ex rel. Nat'l Starch Co. v. Waldron*,[56] presented the question of the validity of an assessment of machinery consisting of steam engines, pumps and shafting installed in a building by the taxpayer's predecessor in title and similarily used by the taxpayer for manufacturing purposes. Applying the *Hewitt* test, which had been approved by the court of appeals in *Potter v. Cromwell*,[57] the court held that such machinery had become a fixture and was therefore assessable as realty under the existing tax statute.[58] In reaching its decision the court expressly recognized that the method of annexation of the machinery was not controlling.[59]

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[50] N.Y. REAL PROPERTY TAX LAW § 102(12)(b). The provisions to which the cases refer were formerly contained in N.Y. Tax Law § 2(6).

[51] New York Tel. Co. v. Ferris, 257 App. Div. 415, 13 N.Y.S.2d 359 (1939), *aff'd*, 282 N.Y. 667, 26 N.E.2d 805 (1940); Herkimer County Light & Power Co. v. Johnson, 37 App. Div. 257, 55 N.Y. Supp. 924 (1899).

[52] See People *ex rel.* Nat'l Starch Mfg. Co. v. Waldron, 26 App. Div. 527, 50 N.Y. Supp. 523 (1899); People *ex rel.* 100 Park Ave. v. Boyland, 144 N.Y.S.2d 88 (Sup. Ct. 1953), *modified*, 284 App. Div. 1033, 136 N.Y.S.2d 367 (1954), *rev'd*, 309 N.Y. 685, 128 N.E.2d 325 (1955); Interstate Lien Corp. v. Schmidt, 180 Misc. 910, 44 N.Y.S.2d 709 (Sup. Ct. 1943); Holt v. Male, 29 N.Y.S.2d 111 (Sup. Ct. 1941).

[53] 1 Ohio St. 511, 59 Am. Dec. 634 (1853).

[54] *Id.* at 530, 59 Am. Dec. at 644–45. The court would ascertain the intention of the party making the annexation from the nature of the article affixed, the relation and situation of the party making the annexation and the purpose or use for which the annexation had been made. For criticism of the intention test, see Miles, *The Intention Test in the Law of Fixtures*, 12 N.Y.U.L.Q. REV. 66 (1935).

[55] McRea v. Central Nat'l Bank, 66 N.Y. 489 (1876); Tifft v. Horton, 53 N.Y. 377 (1873); Voorhees v. McGinnis, 48 N.Y. 278 (1872); Potter v. Cromwell, 40 N.Y. 287, 100 Am. Dec. 485 (1869).

[56] 26 App. Div. 527, 50 N.Y. Supp. 523 (1898).

[57] 40 N.Y. 287, 100 Am. Dec. 485 (1869).

[58] N.Y. Sess. Laws 1896, ch. 908.

[59] 26 App. Div. at 532, 50 N.Y. Supp. at 526.

An assessment of machinery used in the manufacture of gas was upheld in the *Herkimer County Light & Power Co. v. Johnson.*[60] Similarly, in *People ex rel. New York Edison Co. v. Wells,*[61] the court refused to disturb an assessment of machinery and appliances installed in a power house erected for the purpose of producing electricity for distribution to the taxpayer's customers. The courts in these two cases, as well as the court in the *National Starch Co.* case, placed great weight on appropriation of the machinery to the use or purpose of the realty to which it was attached. It is also significant in view of some decisions in recent tax cases that the court in the *Herkimer County Light & Power Co.* case asserted:

> Neither would it aid the court to consider the cases holding what are or are not fixtures as between vendor and vendee, mortgagor and mortgagee, heir or devisee and personal representative, mortgagees and execution creditors or between the owner of the fee and his judgment creditors, because the Tax Law has set up a standard of its own which must govern the case.[62]

Although the court of appeals has frequently established tests for determining what constitutes a fixture between private parties,[63] it has issued no authoritative opinion as to what constitutes a fixture under the tax statute.[64] In 1942, the question was squarely presented to the court in *People ex rel. Nat'l Exhibition Co. v. Miller.*[65] The assessment complained of was the inclusion of seating facilities in the Polo Grounds as taxable improvements on the assessment roll. The seats had been installed by a tenant under a long term lease and fastened to risers by anchor bolts and nuts.[66] In the appellate division the court held the seats to be personalty.[67] The court of appeals merely affirmed without opinion.[68] In the same year, upon the authority of the *National Exhibition Co.* case, an assessment of bowling alleys purchased under a conditional sales contract was reversed by the court of appeals in *Bronxville Bowling Club, Inc. v. Schmiedel.*[69] In that case the bowling alleys had been fastened to leveling strips laid upon stringers which in turn were laid upon, but not fastened to, a concrete foundation in the relator's one-story brick building.

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[60] 37 App. Div. 257, 55 N.Y. Supp. 924 (1899). See also Bigler v. Nat'l Bank, 26 Hun 520 (Sup. Ct.), *aff'd,* 97 N.Y. 630 (1884).

[61] 135 App. Div. 644, 119 N.Y. Supp. 1057 (1909), *aff'd,* 198 N.Y. 607, 92 N.E. 1097 (1910).

[62] 37 App. Div. at 264, 55 N.Y. Supp. at 928.

[63] Cases cited note 55 *supra.*

[64] N.Y. Real Property Tax Law § 102(12)(b) (formerly N.Y. Tax Law § 2(6)).

[65] 288 N.Y. 698, 43 N.E.2d 88, *affirming* 263 App. Div. 799, 31 N.Y.S.2d 581 (1941).

[66] Brief for Defendant p. 4, 288 N.Y. 699, 43 N.E.2d 88. In arguing that the seats had become fixtures for tax purposes the defendant asserted in his brief: "One can not well imagine the paying customers at the Polo Grounds perched on bare concrete decks, anxiously avoiding 160,000 anchor bolts left after removal of the seats." *Id.* at 6.

[67] 263 App. Div. 799, 31 N.Y.S.2d 581 (1941). The per curiam opinion of the appellate division, first department, merely stated in relation to the taxability of the seats: "We are of the opinion that the seats valued by the expert called by the defendant at $75,000, are personalty and should not have been included among the taxable improvements." *Id.* at 800, 31 N.Y.S.2d at 582. *But cf. In re* Albanese 44 F.2d 602 (N.D. N.Y. 1930), a bankruptcy proceeding, where chairs installed in a theatre and attached directly to the concrete floor by means of expanding screws were held to constitute part of the realty; Gould v. Springer, 206 N.Y. 641, 99 N.E. 149 (1912), a landlord-tenant case involving an obligation to repair, where theatre chairs bolted to the floor were held to be realty; Pike v. Naylon Securities Co., 140 Misc. 734, 251 N.Y. Supp. 659 (1931); Szues v. Toth, 92 N.Y.L.J. 2178 (1934).

[68] 288 N.Y. 698, 43 N.E.2d 88 (1942).

Since no opinions were written by the court of appeals in the *National Exhibition Co.* and *Bronxville Bowling Club, Inc.* cases, it is difficult to determine whether those decisions effected any substantive change in the law of fixtures in relation to real property taxation. The cases left unanswered the question as to the effect of relationships such as vendor-vendee, lessor-lessee, mortgagor-mortgagee and conditional vendor-conditional vendee upon the taxability of annexed chattels.

However, in a condemnation case, *Matter of City of New York (Whitlock Ave.),*[70] decided four years before *National Exhibition Co.,* the court of appeals had restated certain fundamental principles controlling the law of fixtures. In overturning a condemnation award to a lessee who operated and maintained a silk ribbon manufacturing business,[71] the court announced:

> Machinery normally is personal property and is not deemed a fixture except where it is installed in such manner that its removal will result in material injury to it or the realty, or where the building in which it is placed was specially designed to house it, or where there is other evidence that its installation was of a permanent nature.[72]

The court in the *Whitlock Ave.* case did not decide the question of the effect of private agreements between the annexor and the owner of the fixture in determining whether an article has become a fixture.[73]

Two cases decided subsequent to the *Whitlock Ave., National Exhibition Co.,* and *Bronxville Bowling Club, Inc.* cases demonstrate the confusion as to whether "trade fixtures" of a lessee are taxable as real property. In holding that gasoline tanks, pumps and equipment of a lessee were taxable as real property, the court in *Interstate Lien Corp. v. Schmidt,*[74] concluded:

> Our courts have relegated trade fixtures back to the general rule of fixtures, holding them to be "land," "real estate," and "real property," for purposes of taxation. . . .[75]

But in *People ex rel. 100 Park Ave. v. Boyland,*[76] the court, in deciding that interior partitions, additional electrical wiring and accoustical ceilings installed by tenants and removable without material injury to the freehold were personalty,[77] stated:

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[69] 289 N.Y. 666, 45 N.E.2d 170, *reversing* 263 App. Div. 999, 33 N.Y.S.2d 408 (1942).

[70] 278 N.Y. 276, 16 N.E.2d 281 (1938).

[71] The condemnation award had included the value of machinery, looms attached to the floors by screws and bolts, harnesses and loose extra parts used in connection with the looms. *Id.* at 281, 16 N.E.2d at 282.

[72] 278 N.Y. at 281–82, 16 N.E.2d at 282.

[73] For a discussion of the *Whitlock Ave.* case see Kaplan, *Recent Developments in Condemnation Law Affecting the Law of Fixtures,* 10 BROOKLYN L. REV. 170 (1940).

[74] 180 Misc. 910, 44 N.Y.S.2d 709 (Sup. Ct. 1943).

[75] *Id.* at 913, 44 N.Y.S.2d at 711.

[76] 144 N.Y.S.2d 88 (Sup. Ct. 1953), *modified on other grounds,* 284 App. Div. 1033, 136 N.Y.S.2d 367, *rev'd on other grounds,* 309 N.Y. 685, 128 N.E.2d 325 (1955).

> Unless a contrary expression is expressed, the Law will presume that where installations are made for purposes of conducting the business for which the premises are leased, such installations are not permanent annexations to the freehold, but are made for the sole use and enjoyment of the tenant during the term of his lease. . . .[78]

Notwithstanding the fact that certain nebulous areas exist in determining what constitutes "articles and structures . . . erected upon, under or above the land, or affixed thereto," [79] it is possible to suggest certain principles in relation to the taxability of such property at the present time in New York:

(1) The method of annexation will not determine the legal character of the property.[80]

(2) Articles originally movable in character are normally real property for purposes of taxation if (a) the article cannot be removed without material injury to the building or to the article itself;[81] or (b) the article was specially designed for the building in which it is located;[82] or the building in which it is placed was specially designed to house it; [83] or (c) the article is appropriated to the use or purpose of the realty to which it is connected.[84]

The intention of the taxpayer to make the article or structure a permanent annexation to the freehold is, of course, an important consideration and as a matter of first impression may be considered a separate test; however, such intention is essentially a conclusion which is deduced after an application of the other fixture tests. It has been indicated that under the common law rules the relation and situation of the party making the annexation is a strong factor in determining the intention of the annexor.[85] Since the decisions in New York are conflicting on the applicability of such a factor in real property tax cases, especially in the landlord-tenant cases, the answer to the puzzle must await an authoritative interpretation of the tax statute by the court of appeals or further elaboration of the statute by the legislature.

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[77] *But cf.* Matter of City of New York (Whitlock Ave.) 278 N.Y. 276, 16 N.E.2d 281 (1938), where office partitions and electrical wiring were deemed "fixtures," for which a condemnation award was approved.

[78] 144 N.Y.S.2d at 93. In reaching its decision, it is significant to note that the court in *People ex rel. 100 Park Ave.*, in contrast to the court in Herkimer County Light & Power Co. v. Johnson, 37 App. Div. 257, 55 N.Y. Supp. 924 (1899), relied upon non-tax cases as a basis for its decision. Among such cases were McCrea v. Central Nat'l Bank, 66 N.Y. 489 (1876) (mortgagee-judgment creditor), Tifft v. Horton, 53 N.Y. 377 (1873) (mortgagor-mortgagee), Voorhees v. McGinnis, 48 N.Y. 278 (1872) (vendee at foreclosure sale), and Peter v. Cromwell, 40 N.Y. 287, 100 Am. Dec. 485 (1869) (vendee at foreclosure sale).

[79] N.Y. REAL PROPERTY TAX LAW § 102(12)(b).

[80] People *ex rel.* Nat'l Starch v. Waldron, 26 App. Div. 527, 50 N.Y. Supp. 523 (1898); see Matter of Bronxville Bowling Club, Inc., 289 N.Y. 666, 45 N.E.2d 170 (1942); People *ex rel.* Nat'l Exhibition Co. v. Miller, 288 N.Y. 698, 43 N.E.2d 88 (1942); Matter of City of New York (Whitlock Ave.), 278 N.Y. 276, 16 N.E.2d 281 (1938); Voorhees v. McGinnis, 48 N.Y. 278 (1872).

[81] See Matter of City of New York (Whitlock Ave.), 278 N.Y. 276, 16 N.E.2d 281 (1938); McRea v. Central Nat'l Bank, 66 N.Y. 489 (1876).

[82] People *ex rel.* New York Edison Co. v. Wells, 135 App. Div. 644, 119 N.Y. Supp. 1057 (1909), *aff'd,* 198 N.Y. 607, 92 N.E. 1097 (1910).

[83] See Matter of City of New York (Whitlock Ave.), 278 N.Y. 276, 16 N.E.2d 281 (1938).

[84] Herkimer County Light and Power Co. v. Johnson, 37 App. Div. 257, 55 N.Y. Supp. 924 (1899); People *ex rel.* Nat'l Starch Co. v. Waldron, 26 App. Div. 527, 50 N.Y. Supp. 523 (1898); Interstate Lien Corp. v. Schmidt, 180 Misc. 910, 44 N.Y.S.2d 709 (Sup. Ct. 1943). See also Village of No. Hornell v. Rauber, 181 Misc. 546, 40 N.Y.S.2d 938 (Sup. Ct. 1943). *But see* People *ex rel.* 100 Park Ave. v. Boyland, 144 N.Y.S.2d 88 (Sup. Ct. 1953), *modified on other grounds,* 284 App. Div. 1033, 136 N.Y.S.2d 367, *rev'd on other grounds,* 309 N.Y. 685, 128 N.E.2d 325 (1955).

It is submitted, however, that the assessor should be required neither to inquire into the relation and situation of the annexor nor to examine private agreements in determining the legal classification of annexed property. To impose such requirements would place a heavy burden on the assessor, and at the same time would encourage evasion of the real property tax.

PROPERTY OF "9-A" CORPORATIONS

In defining "real property," "property," or "land" the legislature has excluded certain equipment and machinery of mercantile and manufacturing corporations organized under article 9-A of the Tax Law.[86] To be excluded the property must be: (1) movable machinery or equipment consisting of structures or erections to the operation of which machinery is essential; (2) owned by a corporation taxable under article 9-A of the Tax Law; (3) used for trade and manufacture; (4) not essential to the support of, and removable without injury to the building, structure or superstructure.[87]

Applying these "9-A" tests, the courts have decided that vats and brew kettles used in the manufacture of ice and beer,[88] the machinery in an artificial ice plant,[89] machinery and equipment used in manufacturing chemicals,[90] and crushers, bins, screens, scales and conveyors used in the process of crushing stone [91] are personal property under the Real Property Tax Law.

On the other hand, in several cases where the corporate taxpayer has argued that some of its property should be exempted from local assessment, the courts have determined that the "9-A" tests were not satisfied. For example, in *Matter of Hazelwood Oil Co.*,[92] it was held that oil wells and fixtures were assessable as real property, and in *Standard Oil Co. v. Goldfogle*,[93] the court decided that large oil tanks and stills were also subject to local assessment.

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[85] Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634 (1853).

[86] N.Y. REAL PROPERTY TAX LAW § 102(12)(f) (formerly N.Y. TAX LAW § 3).

[87] *Ibid.* The mercantile and manufacturing corporations, however, are not free from taxation. A franchise tax is imposed on every domestic and foreign corporation doing business in New York. N.Y. TAX LAW § 209.

[88] Leonhard Michael Brewing Co. v. Cantor, 119 Misc. 854, 198 N.Y. Supp. 284 (Sup. Ct. 1922).

[89] People *ex rel.* Jacob Ruppert Realty Corp. v. Cantor, 115 Misc. 519, 188 N.Y. Supp. 885 (Sup. Ct. 1921), *aff'd,* 204 App. Div. 863, 197 N.Y. Supp. 939 (1922).

[90] People *ex rel.* Gen. Chem. Co. v. Cantor, 105 Misc. 62, 172 N.Y. Supp. 582 (Sup. Ct. 1918), *aff'd,* 188 App. Div. 959, 177 N.Y. Supp. 922 (1919), *aff'd,* 228 N.Y. 506, 126 N.E. 919 (1920).

[91] Tri-County Asphalt & Stone Co. v. Board of Assessors, 17 Misc. 2d 437, 190 N.Y.S.2d 1021 (Sup. Ct. 1958).

The exclusion of certain property of "9-A" corporations property for purposes of real property taxation does not compel a rejection of the fixture rules discussed in the preceding section. Although the taxpayer is a "9-A" corporation, the assessor may still apply the general rules relating to taxability of fixtures. In the event that the machinery or equipment is classified as real property, the tests applicable to "9-A" corporations should be applied to determine whether the property should be excluded from the assessment roll.[94]

A simple illustration will demonstrate the application of the "9-A" tests. Assume A, a private individual, operates a saw mill. During the taxable year A purchases a planing machine specially built for use in his mill. It also appears that A would not have been able to continue the operation of his mill without such a machine and that the machine can be removed without injury to the building. Upon application of the fixture tests of (1) special design,[95] and (2) appropriation to the use of the realty to which it is connected,[96] an intention by A to annex the machine permanently as a part of the freehold can be inferred. The planing machine is therefore assessable as real property.

Assume the same facts, substituting X Corporation in place of A. Since it has already been determined that the machinery is real property when annexed by a private individual, the applicable tests for a "9-A" corporation should be applied to the facts. An application of the tests will indicate that the planing machine is (1) movable; (2) owned by a "9-A" corporation; (3) used for trade or manufacture; (4) not essential to the support of, and removable without material injury to, the building which houses it. Since the statutory conditions for exclusion of the property from taxation are satisfied, the planing machine should be deemed personal property for real property tax purposes.

LEASEHOLDS

Although the question as to whether a leasehold constitutes real property for purposes of taxation has arisen occasionally in New York under varying circumstances, the courts have experienced little difficulty in disposing of the problem.

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[92] 195 App. Div. 23, 185 N.Y. Supp. 809 (1920).

[93] 255 App. Div. 1022, 8 N.Y.S.2d 571, *aff'd*, 282 N.Y. 566, 24 N.E.2d 986 (1939); *cf.* Spoor-Lasher Co. v. Newburgh Gas & Oil Co., 269 N.Y. 447, 199 N.E. 656 (1936). Compare Metropolitan Sand & Gravel Co. v. Boyland, 126 N.Y.L.J. 1728 (1951).

[94] Even though a "9-A" corporation is concerned, boilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than countershafting and equipment used for the distribution of heat, light, power, gases and liquids are assessable against the corporation. N.Y. REAL PROPERTY TAX LAW § 102(12)(f); People *ex rel.* Jacob Ruppert Realty Corp. v. Cantor, 115 Misc. 519, 188 N.Y. Supp. 885 (Sup. Ct. 1921), *aff'd*, 204 App. Div. 863, 197 N.Y. Supp. 939 (1922).

[95] See text accompanying note 83 *supra*.

[96] See text accompanying note 84 *supra*.

In *Matter of Althouse,*[97] it was held that a decedent's interest as lessee under a lease which provided that at the expiration of the term the lessor would either pay the value of the building erected on the premises, or, at the option of the lessee, grant a new lease for a second term, was personal property within the meaning of the transfer tax law which was then in effect.[98] In reaching its conclusion the court stated: "The Tax Law does not in terms designate leaseholds as real property, and this should not be read into the statute merely because buildings, reserved to a tenant, may be included within the statutory definition of real estate given therein." [99]

Recently, two decisions of the court of appeals have clearly stamped the mark of personalty on leasehold interests for purposes of local taxation. In *Grumman Aircraft Eng'r Corp. v. Board of Assessors,*[100] the court of appeals invalidated a real property assessment of petitioner Grumman's alleged interest in an aircraft plant originally built by Grumman under a contract with the Department of the Navy and subsequently leased by it from the Government for a term of five years with the right of renewal at the lessee's option for two successive five-year periods. The lease also granted Grumman an option to purchase in the event that the Secretary of the Navy determined that the facilities were in excess of the needs of the Navy. The assessment was levied pursuant to subdivision 17 of former section 4 of the Tax Law which provided:

> Whenever the legal title of real property is in the United States or in this state, but the use, occupation or possession thereof is in a corporation . . . under a contract of sale or other agreement whereby upon certain payment or payments the legal title is to be or may be acquired by such corporations . . . its interest in such real property shall be assessed and taxed as real property. . . .[101]

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[97] 63 App. Div. 252, 71 N.Y. Supp. 445, *aff'd,* 168 N.Y. 670, 61 N.E. 1127 (1901).

[98] N.Y. TAX LAW art. 10.

[99] 63 App. Div. at 255, 71 N.Y. Supp. at 447. In non-tax cases under a long line of New York decisions the courts have recognized that the interest of a tenant under a lease for years is a chattel real which is personal property; see, *e.g.,* Despard v. Churchill, 53 N.Y. 192 (1873); First Trust & Deposit Co. v. Syrdelco, Inc., 249 App. Div. 285, 292 N.Y. Supp. 206 (1936); Matter of Ehrsam, 37 App. Div. 272, 55 N.Y. Supp. 942 (1899).

[100] 2 N.Y.2d 500, 141 N.E.2d 794, 161 N.Y.S.2d 393, *cert. denied,* 355 U.S. 814, *rehearing denied,* 355 U.S. 885 (1957).

[101] Substantially N.Y. REAL PROPERTY TAX LAW § 402. The statute was originally enacted as chapter 99 of the Laws of 1925 as an attempt to overrule People *ex rel.* Donner-Union Coke Corp. v. Burke, 204 App. Div. 557, 198 N.Y. Supp. 601, *aff'd,* 236 N.Y. 650, 142 N.E. 320 (1923). Donner had been in possession of a coke plant under an executory contract of sale. The assessment of the value of the plant against Donner was struck down as illegal on the ground that the plant was owned by the United States and therefore exempt from taxation. See Matter of Donner-Hanna Coke Corp., 212 App. Div. 338, 209 N.Y. Supp. 62, *aff'd,* 241 N.Y. 530, 150 N.E. 541 (1925). After the enactment of the statute, an assessment against Donner was struck down again, this time on the grounds that Donner should be considered the lessee of the Government and that as applied to Donner the provision was an ex post facto law. People *ex rel.* Donner-Hanna Coke Corp. v. Burke, 128 Misc. 195, 217 N.Y. Supp. 803 (Sup. Ct. 1926), *aff'd,* 222 App. Div. 790, 226 N.Y. Supp. 882 (1927), *aff'd,* 248 N.Y. 507, 162 N.E. 503 (1928).

Although the court recognized that the United States had waived its tax immunity by permitting local taxation of the interest of its lessee,[102] it emphasized that such waiver is permissive only and that no assessment can be levied unless authorized by local law. In reaching its decision the court remarked:

> It is significant to note that nowhere in the Tax Law has the Legislature characterized a leasehold as taxable real property. Such omission is understandable, as a lease for years is deemed personalty. . . .[103]

The majority opinion concluded that the statute did not reach Grumman's interest since Grumman's option was "nothing more than a right of first refusal" [104] contingent upon the happening of conditions not within Grumman's control. The court emphasized that the immunity of the United States attaches "only when the Government holds a bare legal title analogous to a mortgage." [105]

A similar situation was presented to the court in *Fort Hamilton Manor Inc. v. Boyland,*[106] where the city of New York levied a real estate tax assessment on the interest of the petitioner within a military reservation owned by the United States. The petitioner had erected housing accommodations which, by the terms of two seventy-five year leases, remained the property of the petitioner during the term of the leases. The leases also provided that the improvements would inure to the benefit of the Government as part of the reversion if not removed by the tenant before the termination of the lease. Although the court of appeals recognized that the United States had consented to the taxation of its lessee's interest, it again ordered such an assessment struck from the assessment roll on the ground that a leasehold is personalty and that no state statute provided for the taxation of a lessee's interest.[107] However, the court sustained the assessment against the lessee for the value of the improvements. It recognized that the statute which classifies real property [108] reaches buildings and other structures erected by a lessee on land that is non-taxable so long as the improvements are removable under the terms of the lease.[109]

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[102] Military Leasing Act, 61 Stat. 774 (1947), 10 U.S.C. § 2267(e) (Supp. V, 1958).

[103] 2 N.Y.2d at 507, 141 N.E.2d at 797, 161 N.Y.S.2d at 397.

[104] Two days prior to the decision in the *Grumman* case, the legislature passed a bill authorizing an assessment against a person using, occupying, or possessing real property owned by the United States or the State of New York and having "a right to acquire the premises through an option, a first privilege or a first refusal." N.Y. Sess. Laws 1957, ch. 933 (now N.Y. Real Property Tax Law § 402).

[105] Judge Fuld, in a dissenting opinion, argued that the statute contained no language which limited its application to a vendee-in-possession or a holder of the equitable title. 2 N.Y.2d at 511, 141 N.E.2d at 800, 161 N.Y.S.2d at 401.

[106] 4 N.Y.2d 192, 149 N.E.2d 856, 173 N.Y.S.2d 560 (1958).

[107] See Offut Housing Co. v. County of Sarpy, 351 U.S. 253 (1956), where the Supreme Court sustained a personal property tax against a lessee's interest in a similar military housing project.

[108] N.Y. Real Property Tax Law § 102(12)(b) (formerly N.Y. Tax Law § 2(6)).

[109] People *ex rel.* Hudson River Day Line v. Franck, 257 N.Y. 69, 177 N.E. 312 (1931); *accord,* United States v. Dughi, 180 F. Supp. 118 (S.D. N.Y. 1960).

Following the decision in the *Fort Hamilton Manor* case, the legislature responded to the court's suggestion that the legislature possessed the power to tax a leasehold interest such as that which was involved in the *Fort Hamilton Manor* case. It passed a bill[110] which would have authorized the taxation of the interest of a lessee of real property owned by the federal, state or local government. The Governor, in the face of strong opposition, vetoed the bill.[111] An almost identical bill[112] was passed by the legislature during the 1959 session but was also vetoed by the Governor.

The continued immunity of leasehold interests of business users of government-owned real property would appear to affect adversely the municipal finances of many communities in New York, especially those in which substantial tracts of land have been acquired by the federal government for military purposes. It would seem that the enactment of remedial legislation to capitalize upon the federal government's waiver of immunity with respect to its lessees would benefit such communities.

CONCLUSION

As long as the taxes levied upon real property remain an important source of municipal revenue, the New York statute which classifies real property for tax purposes will continue to be of special concern to municipalities. The statutory enumeration of specific kinds of property as real property for purposes of taxation in New York has resolved many questions of classification that might otherwise arise. However, the conflicting judicial decisions involving that species of property known as fixtures indicate the need for further judicial elaboration or legislative re-examination of the applicable statutory provisions pertaining to such property. Until such time as assessors are provided with further guidance in the area of classification relating to fixtures, the salutary effect of the statute as a whole will be diminished.

JOHN L. BELL

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[110] Assembly Int. No. 4268 (1958). The New York bill was patterned after a Michigan statute which had been drawn to reach exempt real property under a lease to a private corporation. MICH. STAT. ANN. §§ 7.7(5), (6) (Supp. 1957). The constitutionality of the statute was upheld in United States v. City of Detroit, 355 U.S. 464 (1958). For a discussion of state taxation of federal contractors and lessees see *The Supreme Court, 1957 Term,* 72 HARV. L. REV. 157 (1958).

[111] See State of New York Executive Chamber Press Release No. 282, April 23, 1958.

[112] Assembly Int. No. 3065 (1959).

CORPORATE MANAGEMENT BY AN EXECUTIVE COMMITTEE: PROPOSED NEW YORK BUSINESS CORPORATION ACT

"The business of a corporation shall be managed by its board of directors. . . ." [1] This broad statement indicates that all decisional matters confronting the officials of a corporation must be referred to the board of directors for a final determination. However, it is apparent that a board of directors cannot possibly handle the everyday business affairs of a corporation unless some of the managerial functions can be delegated.

The question has often arisen whether or not the directors have the power to delegate their duties.[2] If the relationship of the board of directors to the corporation is that of principal and agent, then according to well settled rules of agency, the agent cannot subdelegate the powers and duties conferred by the principal.[3] The law governing the liability of the corporation for the acts of its directors corresponds exactly, in some instances, to the law regulating the liability of the principal for acts done by the agent.[4] Moreover, the courts have also used the word "agent" in describing the directors' relationship to the corporation.[5] It has also been suggested by some courts that the board of directors is the agent of the stockholders.[6] This view is untenable, on the ground that if the directors are the agents for the stockholders, their actions can be controlled by their principals. If the stockholders can control the activities of the board in every instance, as a principal can regulate the actions of his agent, the primary purpose of having directors is destroyed by placing management of the corporate affairs in the hands of the investors.[7]

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[1] N.Y. GEN. CORP. LAW § 27.

[2] See, *e.g.*, Lydia E. Pinkham Medicine Co. v. Gove, 298 Mass. 53, 9 N.E.2d 573 (1937); Sheridan Elec. Light Co. v. Chatham Nat'l Bank, 127 N.Y. 517, 28 N.E. 467 (1891); Olcott v. Tioga R.R., 27 N.Y. 546 (1863); Hoyt v. Thompson's Ex'r, 19 N.Y. 207 (1859).

[3] White v. Consumers Fin. Serv. Inc., 339 Pa. 417, 15 A.2d 142 (1940). *But see* Waggaman v. General Fin. Co., 116 F.2d 254 (3d Cir. 1940). See generally Seavey, *Subagents and Subservants*, 68 HARV. L. REV. 658 (1955).

[4] The ordinary rules of agency are applicable in considering the acts of the board when dealing with third persons in behalf of the corporation. See, *e.g.*, Eliasberg v. Standard Oil Co., 23 N.J. Super. 431, 92 A.2d 862 (1952), *aff'd*, 12 N.J. 467, 97 A.2d 437 (1953), where the court asserted that unauthorized acts of the board of directors, which would not create corporate liability, may subsequently be ratified by the stockholders and, therefore, be made binding upon the corporation. See Inhabitants of Arlington v. Peirce, 122 Mass. 270 (1877); Continental Sec. Co. v. Belmont, 206 N.Y. 7, 99 N.E. 138 (1912); Martin v. Niagara Falls Paper Mfg. Co., 122 N.Y. 165, 25 N.E. 303 (1890). *But see* Kent v. Quicksilver Mining Co., 78 N.Y. 159 (1879), where the court recognized the principle that the stockholders have no authority to ratify an act of the board which is prohibited by law or is against public policy.

[5] Briggs v. Spaulding, 141 U.S. 132 (1891); Ten Eyck v. Pontiac, Oxford & Port Austin R.R., 74 Mich. 226, 41 N.W. 905 (1889).

[6] See West v. Topeka Sav. Bank, 66 Kan. 524, 72 Pac. 252 (1903); Bent v. Priest, 86 Mo. 475 (1885).

[7] See McQuade v. Stoneham, 263 N.Y. 323, 189 N.E. 234 (1934); Manson v. Curtis, 223 N.Y. 313, 119 N.E. 559 (1918).

A more acceptable theory, however, concerning the relationship of the board of directors to the stockholders and corporation was expressed in *Hoyt v. Thompson's Ex'r* [8] as follows:

> The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds toward his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former. . . . [I]n corporate bodies the powers of the board of directors are . . . original and undelegated. The stockholders do not confer, nor can they revoke those powers.[9]

The *Hoyt* case also establishes the doctrine that the board of directors may delegate its duties to an executive committee. In that case the validity of an assignment of securities was attacked on the ground that it was made by an executive officer of the company without the authority of the board. However, the action taken by the executive officer had the approval of an executive committee which had been organized in accordance with the by-laws of the company. In construing the corporate charter which stated that the corporate power of the company should be exercised by the board of directors, consisting of twenty-three persons, the court stated:

> [I]t would be a very extraordinary construction of the charter . . . to hold that the board of twenty-three directors . . . must meet and act whenever any corporate power was to be exercised, and that no delegation of authority could be made to subordinate agents, to committees, or to a quorum consisting of a smaller number. . . . The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals they may delegate to agents of their own appointment the performance of any acts which they themselves can perform. The recognition of this principle is absolutely necessary in the affairs of every corporation whose powers are vested in a board of directors. Without it the most ordinary business could not be carried on, and the corporate powers could not be executed.[10]

In the modern business world the use of an executive committee to handle all the business of the company during the interim between board meetings has proved to be an invaluable device. It would be impratical and impossible for the board of a large corporation to be in constant session so that the necessary decisions, requiring the directors' action, could be made as they arise from day to day. In order to compensate for the lack of a "working board" an executive committee, which is normally comprised of several members of the board and corporate officials, is often appointed and empowered to make interim exercise of the powers of the board in the management of the business and affairs of the company.[11] Assuming that the board of directors has the right conferred upon it either by statutory provisions, the common law, or the certificate of incorporation or by-laws, to delegate its powers and duties to an executive committee, uncertainty arises as to the nature and extent of the powers the committee may exercise.

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[8] 19 N.Y. 207 (1859).

[9] *Id.* at 216. *But see* Perfex Radiator Co. v. Goetz, 179 Wis. 338, 341, 191 N.W. 755, 759 (1923), where the court stated: "[I]t is ordinarily illegal for a board of directors to delegate the powers vested in them, either by statute or the articles of organization . . . and such delegation ordinarily is as illegal as is the delegation of power of a legislative body, unless expressly authorized by law." See Ames v. Goldfield Merger Mines Co., 227 Fed. 292 (W.D. Wash. 1915).

[10] 19 N.Y. at 216.

Although the proposition that the board cannot delegate its authority has been held untenable,[12] some courts have taken the position that the board's power of delegation is limited solely to ministerial functions as compared to discretionary functions.[13] Since the relationship of the board of directors to the corporation has been characterized as that of trustees to a *cestui que trust*,[14] then the distinction with respect to ministerial and discretionary functions could rationally be made on the theory that as trustee they may not delegate duties which require the use of their discretion and judgment.[15]

With the complexities of present day corporate structure and with the realization that the board of directors cannot perform all the duties of management involving the exercise of discretion, most courts have been more liberal in their recognition of the right of the directors to delegate to executive committees functions which require use of judgment and discretion.[16]

In *Dyer Bros. Golden West Iron Works v. Central Iron Works*,[17] several steel and iron manufacturers entered into a contract to protect themselves against various demands of their employees. Holding that it was not an undue delegation of the discretionary functions of the board to appoint an executive committee to which was delegated full and exclusive power to represent the parties in negotiations with the employees for a period of three years, the court stated: "The modern method of transacting corporate business requires that agents frequently, in cases where action by the board of directors would be impracticable or unfeasible, represent the corporation in dealings requiring the exercise of a great degree of discretion." [18]

A similar case in point is *Lawrence v. Atlantic Paper & Pulp Corp.*[19] The corporate charter conferred upon the board the power to appoint an executive committee, and it further provided that the committee could exercise all the powers possessed by the board. The directors of the corporation, which was insolvent, adopted a resolution giving the executive committee the authority to decide what action should be taken to protect the corporate creditors, "whether by general assignment for the benefit of creditors, by applying for the appointment of a receiver of the property of the corporation, by filing a voluntary petition in bankruptcy or *otherwise*. . . ." [20] The court, in upholding the executive committee's action in filing a voluntary petition in bankruptcy, stated that the delegation of authority was valid and that the executive committee in adopting its action bound the corporation and its stockholders.

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[11] See generally Mylander, *Management By Executive Committee*, 33 HARV. BUS. REV. 51, May-June 1955, p. 51. The author discusses the advantages and disadvantages of an executive committee as it is used by E. I. du Pont de Nemours & Co.

[12] See, *e.g.*, Manson v. Curtis, 223 N.Y. 313, 119 N.E. 559 (1918); Hoyt v. Thompson's Ex'r, 19 N.Y. 207 (1859).

[13] Farmers' Mutual Fire Ins. Co. v. Chase, 56 N.H. 341 (1876); Gillis v. Bailey, 21 N.H. 149 (1850); Tempel v. Dodge, 89 Tex. 69, 32 S.W. 514 (1895).

[14] Bent v. Priest, 86 Mo. 475 (1885).

[15] Meck v. Behrens, 141 Wash. 676, 252 Pac. 91 (1927).

[16] Lawrence v. Atlantic Paper & Pulp Corp., 298 Fed. 246 (5th Cir. 1924); Dyer Bros. Golden West Iron Works v. Central Iron Works, 182 Cal. 588, 189 Pac. 445 (1920); Haldeman v. Haldeman, 176 Ky. 635, 197 S.W. 376 (1917).

[17] 182 Cal. 588, 189 Pac. 445 (1920).

[18] *Id.* at 594, 189 Pac. at 447.

[19] 298 Fed. 246 (5th Cir. 1924).

In order to resolve the question whether or not the board of directors has the authority to delegate its duties and powers, most jurisdictions have enacted statutes permitting such action.[21] Although New York does not have a statute which authorizes appointment of an executive committee, the New York courts have sustained the appointment of such committees and the right of the board to delegate to them functions and powers of the board of directors.[22]

The broad statement made in the *Hoyt* decision that "the directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals they may delegate to agents of their own appointment the performance of any acts which they themselves can perform," [23] would seem to indicate that no specific limitation has been placed by the New York courts on the power of the board to delegate corporate functions. However, the New York courts have placed limitations on a board's power to delegate managerial functions by authorizing the board to confer upon the executive committee the right to undertake only ministerial or ordinary functions.[24] The position of the New York courts with respect to the delegation of the discretionary functions of the board of directors is not altogether clear because of the fact that some courts have used the word "ministerial" [25] in describing the limitation placed on the executive committee while other courts have in the same connection used the word "ordinary." [26]

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[20] *Id.* at 249. (Emphasis added.)

[21] Among the states not having such provisions are the following: Ariz., Miss., Mont., N.H., N.Y., S.C., Utah and Wyo.

[22] Cassidy v. Uhlmann, 170 N.Y. 505, 63 N.E. 554 (1902); Sheridan Elec. Light Co. v. Chatham Nat'l Bank, 127 N.Y. 517, 28 N.E. 467 (1891); Hoyt v. Thompson's Ex'r, 19 N.Y. 207 (1859); First Nat'l Bank v. Commercial Travelers' Home Ass'n of America, 108 App. Div. 78, 95 N.Y. Supp. 454 (1905), *aff'd,* 185 N.Y. 575, 78 N.E. 1103 (1906).

[23] Hoyt v. Thompson's Ex'r, *supra* note 22, at 216.

[24] Sheridan Elec. Light Co. v. Chatham Nat'l Bank, 127 N.Y. 517, 28 N.E. 467 (1891); Hoyt v. Thompson's Ex'r, 19 N.Y. 207 (1859); First Nat'l Bank v. Commercial Travelers' Home Ass'n of America, 108 App. Div. 78, 95 N.Y. Supp. 454 (1905), *aff'd,* 185 N.Y. 575, 78 N.E. 1103 (1906); Fensterer v. Pressure Lighting Co., 85 Misc. 621, 149 N.Y. Supp. 49 (N.Y. City Ct. 1914); see Burden v. Burden, 8 App. Div. 160, 40 N.Y. Supp. 499 (1896), *aff'd,* 159 N.Y. 287, 54 N.E. 17 (1899).

[25] Sheridan Elec. Light Co. v. Chatham Nat'l Bank, *supra* note 24; First Nat'l Bank v. Commercial Travelers' Home Ass'n of America, *supra* note 24; see Fensterer v. Pressure Lighting Co., *supra* note 24.

[26] Hoyt v. Thompson's Ex'r, 19 N.Y. 207 (1859); see Burden v. Burden, 8 App. Div. 160, 40 N.Y. Supp. 499 (1896), *aff'd,* 159 N.Y. 287, 54 N.E. 17 (1899).

Limiting the prerogatives of an executive committee which has been purportedly granted the full powers of the board of directors when the board is not in session, the New York courts have denied authority to such a committee to remove officers of the corporation.[27] Similarly, it was held that the members of the executive committee have no authority to vote compensation to themselves for attending meetings of the committee [28] or to issue stock.[29] Nor does an executive committee have the power to act on any matters during the period between the calling and the holding of the board meeting.[30] On the other hand, the issuing of a negotiable note [31] and the power to endorse checks payable to the corporation and to receive the money thereon [32] have been upheld as a valid delegation of authority.

Moreover, if an executive committee takes action on behalf of the corporation without any authority or performs acts which are solely within the province of the board and the act is one which could have been originally authorized by the stockholders or the board, subsequent ratifications will bind the corporation as if it had been authorized when done.[33] Similarly, mere silence and acquiescence on behalf of the corporation may validate the committee's unauthorized action.[34]

If a distinction is to be drawn between the authority to delegate ministerial and discretionary functions, the New York courts will force parties, desirous of dealing with the executive committee, to follow either a safe course of action and wait until the next board meeting or transact business directly with the executive committee in the hope that the corporation may ratify the act or acquiesce thereto. It would be an onerous burden to expect a third party who plans to enter into a business arrangement with the corporation to determine whether the functions delegated to the executive committee are of a discretionary or ministerial nature.

In order to alleviate this problem and to provide for clarification in this heretofore nebulous area, it has been recommended [35] that legislation be enacted similar to the provisions defined in the Model Business Corporation Act[36] and those set forth in the Illinois Business Corporation Act.[37]

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[27] Fensterer v. Pressure Lighting Co., 85 Misc. 621, 149 N.Y. Supp. 49 (N.Y. City Ct. 1914).

[28] Marshall v. Industrial Fed'n of America, 84 N.Y. Supp. 866 (Sup. Ct. 1903).

[29] Ryder v. Bushwick R.R., 134 N.Y. 83, 31 N.E. 251 (1892).

[30] Commercial Wood & Cement Co. v. Northampton Portland Cement Co., 190 N.Y. 1, 82 N.E. 730 (1907).

[31] First Nat'l Bank v. Commercial Travelers' Home Ass'n of America, 108 App. Div. 78, 95 N.Y. Supp. 454 (1905), *aff'd,* 185 N.Y. 575, 78 N.E. 1103 (1906).

[32] Sheridan Elec. Light Co. v. Chatham Nat'l Bank, 127 N.Y. 517, 28 N.E. 467 (1891).

[33] Patterson v. Ongley Elec. Co., 87 Hun 462, 34 N.Y. Supp. 209 (Sup. Ct. 1895); see Ryder v. Bushwick R.R., 134 N.Y. 83, 31 N.E. 251 (1892).

[34] See Jourdan v. Long Island R.R., 115 N.Y. 380, 22 N.E. 153 (1889), where the defendant was held liable for breach of contract for refusing to run its trains over the Coney Island Railroad and to furnish terminal facilities for the latter as had been agreed upon by the president and secretary of the defendant who had acted beyond their authority. Although there was no proof that the directors had knowledge of the terms of the contract from which the company had received pecuniary benefits, the court maintained that if the directors "intended to disavow it, it was their duty to be active in so doing and not remain wilfully passive, in order to profit by an omission or mistake on the part of their own officers. . . ." *Id.* at 385, 22 N.E. at 154.

[35] Joint Leg. Comm. to Study Revision of Corp. Laws, N.Y. Leg. Doc., No. 15 (Supp.

The Model Act authorizes the board of directors, if the articles of incorporation or the by-laws so provide, to designate by resolution two or more directors to constitute an executive committee. The full authority of the board of directors in the management of the corporation may be exercised by the executive committee to the extent provided in the resolution, the certificate of incorporation, or the by-laws of the corporation.[38]

The provision in the Model Act authorizing the appointment of an executive committee was based largely on the Illinois statute, as it existed prior to its recent amendment.[39] The recent amendment specifies the areas in which an executive committee is prohibited from taking action. These exceptions are considered to be of such importance that they are solely within the province of the board.[40]

The proposed New York legislation[41] is an adaptation of section 38 of the Model Act. However, like the Illinois statute, it explicitly enumerates the areas in which the board itself must assume responsibility. The committee may exercise all the authority of the board of directors except that such committee shall not have the authority of the board of directors with respect to the following matters:

> (1) The recommending to shareholders of any action that needs shareholders' approval. . . .
> (2) The filling of vacancies in the board of directors or in any committee.
> (3) The fixing of compensation for the members of the executive committee or other committees.
> (4) The amendment or repeal of the by-laws of the corporation.
> (5) The amendment or repeal of any resolution of the directors which by its terms shall not be so amendable or repealable.[42]

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to Fourth Interim Report 1960), at 46–47; Joint Leg. Comm. to Study Revision of Corp. Laws, N.Y. Leg. Doc., No. 39 (1959), at 87–88; Joint Leg. Comm. to Study Revision of Corp. Laws, N.Y. Leg. Doc., No. 23 (1958), at 48–49.

[36] MODEL BUS. CORP. ACT § 38 (1950).

[37] ILL. REV. STAT. ch. 32, § 157.38 (1959).

[38] MODEL BUS. CORP. ACT § 38 (1950).

[39] ILL. REV. STAT. ch. 32, § 157.38 (1959).

[40] The Illinois Business Corporation Act, *supra* note 37, provides that the executive "committee shall not have the authority of the board of directors in reference to amending the articles of incorporation, adopting a plan of merger or adopting a plan of consolidation with another corporation or corporations, recommending to the shareholders the sale, lease, exchange, mortgage, pledge or other disposition of all or substantially all of the property and assets of the corporation if not made in the usual and regular course of its business, recommending to the shareholders a voluntary dissolution of the corporation or a revocation thereof, amending, altering or repealing the by-laws of the corporation, electing or removing officers of the corporation or members of the executive committee, fixing the compensation of any member of the executive committee, declaring dividends, or amending, altering or repealing any resolution of the board of directors which by its terms provides that it shall not be amended, altered or repealed by the executive committee."

[41] Proposed N.Y. Bus. Corp. Law § 7.12.

[42] Proposed N.Y. Bus. Corp. Law § 7.12.

It is difficult to determine what precise effect this proposed statute if enacted will have on the board's power of delegation. The fact that other states have enacted a similar provision would seem to give some indication as to what the judicial interpretation of the statute will be should questions arise concerning the latitude of the board of directors' power of delegation. The lack of decisional law in sister states, however, in applying and interpreting such provisions, makes uncertain the outcome of litigation that might arise under the proposed statute.

The Joint Legislative Committee to Study Revision of Corporation Laws recognized the fact that large corporations find it impractical and impossible for the board of directors to be in session for the extended duration necessary to cope with business problems arising from the daily management of a corporation that require prompt attention.[43] An important purpose of an executive committee is to expedite the slow, cumbersome and involved process which results where a board of directors is compelled to convene whenever a decision requiring the use of judgment and discretion is necessary. The fulfillment of such purpose can be realized only in so far as all the powers of the board of directors are delegable except those specifically enumerated in section 7.12 of the proposed New York Business Corporation Act.

Directors' Liability for the Misconduct and Negligence of an Executive Committee

If the board of directors has the power to delegate discretionary functions as well as ministerial functions to an executive committee, a pertinent question arises with respect to the liability of the directors for improper action taken by the executive committee. It is well settled that since the directors are charged with the duty of managing the business of the corporation,[44] they may be held accountable for any act of misfeasance or nonfeasance in the exercise of their duties.[45]

With respect to the directors' liability for a breach of due care, several jurisdictions have taken the position that because directors render service gratuitously or for an insignificant amount of compensation, they are only liable for acts which constitute gross negligence.[46] The rule laid down by the New York courts concerning the standard of conduct required of directors of a corporation in the management of its affairs is that the directors must exercise that degree of care which men of ordinary prudence exercise in regard to their own business.[47] The New York rule has been

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[43] See reports cited note 35 *supra*.

[44] N.Y. Gen. Corp. Law § 27.

[45] Kavanaugh v. Commonwealth Trust Co., 223 N.Y. 103, 119 N.E. 237 (1918); Jersawit v. Kaltenbach, 253 App. Div. 265, 1 N.Y.S.2d 756 (1938).

[46] Spiegel v. Beacon Participations, Inc., 297 Mass. 398, 8 N.E.2d 895 (1937); Swentzel v. Penn Bank, 147 Pa. 140, 23 Atl. 405 (1892).

[47] Hanna v. Lyon, 179 N.Y. 107, 71 N.E. 778 (1904); Hun v. Cary, 82 N.Y. 65 (1880). Section 7.15 of the proposed N.Y. Business Corporation Act provides that "directors . . . shall discharge the duties of their . . . positions in good faith and with that degree of dili-

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followed in other jurisdictions.[48] The third standard prescribed by the courts is that the director is bound to exercise that degree of care which ordinary prudent and diligent men would exercise in a like position under similar circumstances.[49]

In addition to the liability imposed upon corporate directors by the New York courts, the legislature has enacted several statutes which prohibit the directors from taking action in certain areas. The New York Stock Corporation Law imposes liability upon a director in favor of the corporation and its creditors for any unlawful payment of dividends.[50] The purpose of this provision is to prevent the withdrawal of corporate assets to a point where such withdrawal would reduce the value of its assets below the sum limited for its capital.[51]

Another statute, enacted by the New York Legislature, imposes liability upon directors who participate in fraudulent transfers of property designed to give preference to a particular creditor of an insolvent corporation.[52] Section 59 of the New York Stock Corporation Law forbids a stock corporation, except a moneyed corporation, from making loans to stockholders. If a director assents to such action, he will be liable to the creditors of the company to the extent of the loan. It is further provided by the New York Stock Corporation Law that where a director signs a report or a public notice that is false in any material representation, he shall be liable to any creditor or stockholder who relies upon such material representation.[53] The object of making a report is to give notice to individuals who are desirous of transacting business with the corporation. If such persons are deceived, the individual making the false report should be held accountable.[54]

Although the courts and legislature have recognized the fact that directors will be liable for their negligence and misconduct in managing the corporate affairs, the judiciary has been reluctant to impose liability upon directors who do not serve on the executive committee for improper action taken by such committee.

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gence, care and skill which ordinary prudent men would exercise under similar circumstances in like positions." The draftees of the proposed act are of the opinion that the prevailing rule in New York with respect to the standard of care required of directors is too strict in regard to the ordinary business corporation. Joint Leg. Comm. to Study Revision of Corp. Laws, N.Y. Leg. Doc., No. 15 (Supp. to Fourth Interim Report 1960), at 48.

[48] Burckhardt v. Northwestern Nat'l Bank, 38 F.2d 568 (9th Cir. 1930); Fisher v. Parr, 92 Md. 245, 48 Atl. 621 (1901), Martin v. Hardy, 251 Mich. 413, 232 N.W. 197 (1930).

[49] Atherton v. Anderson, 99 F.2d 883 (6th Cir. 1938); Lippitt v. Ashley, 89 Conn. 451, 94 Atl. 995 (1915).

[50] N.Y. STOCK CORP. LAW § 58.

[51] Williams v. Western Union Tel. Co., 93 N.Y. 162 (1883); Rorke v. Thomas, 56 N.Y. 559 (1874). The unlawful declaration of dividends also gives rise to criminal liability. N.Y. PENAL LAW § 664(1).

[52] N.Y. STOCK CORP. LAW § 15. See Braem v. Merchants' Nat'l Bank, 127 N.Y. 508, 28 N.E. 597 (1891); King v. Union Iron Co., 58 Hun 601, 11 N.Y. Supp. 603 (Sup. Ct. 1890).

[53] N.Y. STOCK CORP. LAW § 61.

[54] Torbett v. Eaton, 49 Hun 209, 1 N.Y. Supp. 614 (Sup. Ct. 1888), *aff'd,* 113 N.Y. 623, 20 N.E. 876 (1889); Bagley & Sewall Co. v. Lenning, 61 App. Div. 26, 70 N.Y. Supp. 242 (1901).

Although *Briggs v. Spaulding*[55] does not involve an executive committee, it is nevertheless useful to consider in that it discusses the directors' liability for improper action taken by an agent of the corporation who was appointed by the board. The board neglected its supervisory duties and allowed the president to have practically absolute control of the management of the corporation. Regular board meetings were not held, nor was an examining committee appointed as required by the by-laws. As a result of the inattention of the board the president was presented with the opportunity to lend funds of the bank illegally to himself and friends. This action resulted in a depletion of the corporate assets, and the bank soon became insolvent. Among the reasons used by the court in excusing various directors from liability for the misconduct of an agent they had appointed, was the following:

> [The directors] . . . are not the insurers of the fidelity of the agents whom they have appointed, who are not their agents but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents.[56]

The majority of the judges in the *Briggs* case felt that very limited supervision was sufficient to relieve the directors of liability. Although this case has not been expressly overruled, the present tendency is to require the directors to devote more attention to the supervision of the activities of subordinates.[57] However, the courts are still hesitant to hold the directors liable for the negligence or misconduct of agents designated by the board.

The reluctance of the courts to hold the directors liable for the negligence or misconduct of board-appointed agents was expressed in *Warner v. Penoyer*,[58] where, owing to worthless discounts made by the cashier, a bank failed. The board of directors had appointed an examining committee comprised of two directors and the president for the purpose of periodically examining the bank's financial condition and investments. The committee, however, accepted periodic reports prepared by the cashier without making an independent examination. In an action to charge the directors with liability on the ground that they neglected their duties, the court recognized the principle that directors are not justified in relinquishing unlimited discretion to an individual to invest the capital of the bank. The court stated that in this case "the directors . . . relinquished almost untrammeled control of the bank to the cashier, and that their supervision over its affairs was so superficial as to be hardly more than perfunctory."[59] Notwithstanding these facts, the court found, in holding the committee members liable and in exonerating the remaining members of the board, that the board by appointing the committee had provided for reasonable supervision of the cashier and, therefore, should not be liable for the negligent conduct of the committee.

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[55] 141 U.S. 132 (1891).

[56] *Id.* at 147.

[57] See Gamble v. Brown, 29 F.2d 366 (4th Cir.), *cert. denied,* 279 U.S. 839 (1928); Prudential Trust Co. v. McCarter, 271 Mass. 132, 171 N.E. 42 (1930).

[58] 91 Fed. 587 (2d Cir. 1898).

[59] *Id.* at 591.

On the other hand, some courts have more readily imposed liability upon the board for the negligence of a board-appointed committee. The directors have been held liable for the examining committee's negligent failure in not carrying out its statutory duty of reporting to the board all items included in the assets of a trust company which it had reason to believe were not of the value at which they appeared on the books.[60] In *Williams v. McKay*,[61] the court recognized the board's right to appoint committees to conduct the affairs of the bank and the right of the board to rely upon the committees' skill and diligence. The court asserted, however, that the board had the duty to oversee the action taken by such committees and that the directors were chargeable with knowledge of all the important acts of the committees.

The extent to which the board is expected to supervise the activities of an executive committee and at the same time to assume liability for the negligence and misconduct of such committee is not altogether clear in New York because of the dearth of case law. In one appellate division decision,[62] the court asserted that if the board appoints an executive committee to handle the business affairs of the corporation, the members of the board have the right to rely upon the diligence of such committee in discovering and reporting any irregular acts which take place in the corporate management. The court expressed the view that the appointment of an executive committee does not relieve the directors of all responsibility; however, the directors will not be held accountable for the negligent performance of functions which may be delegated by the board.

In other cases, New York courts have taken the position that although directors are liable for their own negligence they are not liable for the negligent conduct of corporate agents appointed by the board.[63] The courts have also held that the directors are not insurers or sureties for the fidelity of such agents.[64] The plaintiff, in cases in which these principles were enunciated, usually sought to hold a director liable for corporate losses occasioned by the negligence or misconduct of an executive officer. Although the executive officer may have been a member of the executive committee, few cases exist in which an action was commenced against a director for the negligence or malfeasance of the entire executive committee. It would seem, however, that the directors are not made responsible in New York for improper action taken by a committee they designate.

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[60] Roseville Trust Co. v. Mott, 93 N.J. Eq. 229, 107 Atl. 462 (1919).

[61] 46 N.J. Eq. 25, 18 Atl. 824 (1889).

[62] Kavanaugh v. Gould, 147 App. Div. 281, 131 N.Y. Supp. 1059 (1911).

[63] Arthur v. Griswold, 55 N.Y. 400 (1874); Jersawit v. Kaltenbach, 253 App. Div. 265, 1 N.Y.S.2d 756 (1938); Bloom v. National United Benefit Sav. & Loan Co., 81 Hun 120, 30 N.Y. Supp. 700 (Sup. Ct. 1894), *aff'd*, 152 N.Y. 114, 46 N.E. 166 (1897). Such a principle was expressed in People v. Equitable Life Assur. Soc'y of the United States, 124 App. Div. 714, 731, 109 N.Y. Supp. 453, 467, where it was stated: "[E]ach director is only liable for his own acts or omissions, and that one is not liable for the acts or omissions of another unless he participated therein to the injury of the corporation, or had some knowledge by which in the exercise of reasonable care he could have prevented the loss or connived at it, or failed to perform his duty of exercising the authority he possessed to prevent losses which should, in the exercise of reasonable care and skill, have been foreseen and guarded against."

[64] Bloom v. National United Benefit Sav. & Loan Co., *supra* note 63.

The reluctance of the courts to hold the directors liable for the negligence of the executive committee is based upon the contention that if they are required to exercise detailed supervision of the management of each corporation in which they are directors or if they were held accountable for the neglect of the executive committee, it would be difficult for them, from the point of view of time and because of the risk involved, to accept a position on corporate boards. The thought is that the more business acquaintances and business experience a man has the more valuable he is to the corporation. If men, measuring up to these criteria, refuse to accept positions on the board of several companies because of the risk involved, it would be detrimental to the effectiveness of the corporate system.[65]

The Model Business Corporation Act provides that the board of directors may appoint an executive committee which may exercise all the authority of the board in the management of the corporation.[66] The Model Act further states that the delegation of such authority shall not operate to relieve the board of directors of any responsibility imposed upon them by law.[67] Several states have enacted a similar provision.[68] Although at the present time in New York it would appear that directors are not held responsible for any improper action taken by a committee they designate, it has been suggested[69] that liability should be imposed upon the board if the executive committee is granted increased powers under the proposed New York Business Corporation Act.[70]

Section 7.12(5)(c) of the proposed New York Business Corporation Act states that the "designation of any [executive] . . . committee and the delegation thereto of authority shall not relieve the directors . . . of any responsibility imposed by law." Section 7.16(j) of the proposed act, which is an adaptation of section 43 of the Model Act, spells out the liability of directors and officers.[71] In addition, a director will similarly be held liable if such prohibited action is taken by an executive committee to which authority for such action has been delegated by the board. A director can relieve himself of liability under section 7.16(j) of the proposed New York Business Corporation Act, if, after learning of such action by the executive committee, he registers his objection with the secretary of the corporation or has his objection filed with the minutes of the board meeting within a reasonable time after gaining knowledge of such action by the executive committee.

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[65] See Wakeman v. Dalley, 51 N.Y. 27 (1872); Kavanaugh v. Gould, 147 App. Div. 281, 131 N.Y. Supp. 1059 (1911).

[66] MODEL BUS. CORP. ACT § 38 (1950).

[67] *Ibid.*

[68] Among the states which have enacted such a provision are: Colo., Ill., Md., N.C. and Tex.

[69] Joint Leg. Comm. to Study Revision of Corp. Law, N.Y. Leg. Doc., No. 15 (Supp. to Fourth Interim Report 1960), at 47.

[70] Proposed N.Y. Bus. Corp. Act § 7.12.

[71] The proposed N.Y. Business Corporation Act § 7.16 provides that directors of a corporation shall be liable for: (a) unlawful declaration of dividends; (b) unlawful purchase of its own shares; (c) distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or making adequate

Under section 7.12(5)(c) of the proposed New York Business Corporation Act, the appointment of an executive committee by the board of directors will not relieve the directors of any liability *imposed upon them by law.* Since responsibility is imposed by law upon directors for their own malfeasance and negligence, the courts could reasonably interpret the language of section 7.12(5)(c) to preclude the board from relieving itself of liability by delegating the management of the company to an executive committee.

Men of prominence are often invited to serve on multiple boards of directors. It is humanly impossible under such circumstances for them to be completely conversant with the details of corporate operations, hence the necessity of delegated functions. If the law should eventually require that these men be responsible for every action that is taken and every policy that is developed by the corporation in executive committee, it would necessarily mean that the scope of their activity would be so enlarged that the present policy could no longer be sustained. The future trend of legislation will have to determine which is more desirable—to add men to the board because of prestige value or to make such appointments because of the individual's special skill and knowledge in a specific field of corporate activity.

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provisions for, all known debts, obligations and liabilities of the corporation; (d) unlawful loans to directors; (e) unlawful transfers of property; (f) issuing any certificate, report or document, made public by the corporation, which is false in any material representation; and (g) failure to forward to the shareholders such written notices as are required by the Business Corporation Act.

LIABILITY OF PROPERTY OWNERS TOWARDS POLICEMEN AND FIREMEN

When a fireman or a policeman enters the premises of another in an attempt to carry out his public duty and is injured due to a dangerous condition thereon, a question arises concerning the duty of care owing to such person by the property owner. The purpose of this comment is to clarify the present New York position on this problem and to compare the New York position with that of other jurisdictions.

The New York Court of Appeals first passed upon the question of a property owner's liability for negligence, resulting in injury to policemen and firemen who enter upon the premises in pursuit of their public duty, in the case of *Meiers v. Fred Koch Brewery*.[1] In the *Meiers* case, a fireman was injured while fighting a fire on the defendant's premises when he fell into an unguarded coal hole in the defendant's driveway. The driveway was used by the defendant and its customers as a means of ingress to the premises from the street. The court determined that since the public service the plaintiff performed was a benefit to the defendant's property, the entry was, in effect, for a purpose connected with defendant's business. Hence, the plaintiff was a business invitee and not a mere licensee. However, the court refused to base its decision on this narrow ground and further stated that the plaintiff's duty to protect the defendant's property resulted in an implied invitation by the defendant to the plaintiff to enter the premises. The court then concluded that even if there were no such implied invitation, since it was the plaintiff's duty to enter he could expect that the means of ingress to the premises were in a reasonably safe condition. In any event, under the circumstances of this case, the plaintiff was more than a mere licensee. The court stated that the decision was to be limited to the precise facts of the case.

That the *Meiers* case did not completely clarify the law on the problem is evidenced by a statement of the same court in the case of *Maloney v. Hearst Hotels Corp.*[2] to the effect that the *Meiers* case did not necessarily go so far as to hold that an owner of property owes the same duty to firemen as he would to an invitee in keeping his premises reasonably safe. The court explained that it would reserve the question for further consideration in a case which might present the precise problem.

The rule promulgated in the *Meiers* case has been extended by the court of appeals in the case of *Jenkins v. 313–321 W. 37th St. Corp.*[3] The decision in that case was to the effect that if the owner knows of the presence of officially privileged persons on his premises, such as firemen or policemen, is cognizant of a dangerous condition thereon, and has reason to believe that such other persons are unaware of the danger, he has a duty to warn them of any such condition and the consequent risk involved.[4] This duty is considered to apply to mere licensees in many jurisdictions,[5] and therefore the *Jenkins* decision cannot be considered a radical departure from the general view.

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[1] 229 N.Y. 10, 127 N.E. 491 (1920).

[2] 274 N.Y. 106, 8 N.E.2d 296 (1937). The plaintiff, a fireman, was injured when paints and other volatile liquids exploded while he was fighting a fire. The court held that the paints were stored in violation of an ordinance which was enacted for the benefit of firemen as well as guests, and thus the plaintiff was allowed a recovery.

[3] 284 N.Y. 397, 31 N.E.2d 503 (1940).

Subsequent to the *Jenkins* case, the court of appeals, in *Plunkett v. Dick,*[6] affirmed a judgment in favor of the survivor of a fireman who fell down an elevator shaft to his death while fighting a fire on the defendant's premises. The door to the shaft was opened by two of the defendant's employees just before they were rescued by the firemen.

Neither the appellate division nor the court of appeals rendered an opinion in this case. A reasonable interpretation of the *Plunkett* case could lead one to the conclusion that a property owner is liable to firemen to the same extent that he would be to invitees. However, from the facts reported, it is also possible to apply the rule advanced in the *Jenkins* case and still reach the same decision. All of the facts on which the *Jenkins* decision was based were present here: (1) the defendant's employees left the shaft open; (2) they knew of the danger; (3) they knew of the firemen's presence and the firemen's ignorance of the danger; and (4) finally, no warning of such danger was given.[7] Therefore it is reasonable to assume that the court in the *Plunkett* case may have based its affirmance on the defendant's breach of duty in failing to warn the firemen of a dangerous situation, and not on the grounds that the plaintiff was an invitee.

The rules set forth in the previous New York cases were synthesized by the appellate division in the case of *Beedenbinder v. Midtown Properties, Inc.*[8] In that case the night watchman of the defendant property owner asked the plaintiff, a policeman, to investigate the unexplained presence of a person in the next building. The policeman, in an effort to investigate, climbed a fence adjoining the defendant's backyard and was injured due to a negligent condition in the fence. The court held that the backyard fence was not an ordinary exit or entrance from the defendant's premises. As a result the court concluded that there was no common law duty owing from the owner of the building to maintain the fence as a safe passageway. The court also held that the question of whether there was a duty to warn was for the jury to determine. The court explained that the *Meiers* case is not authority for the proposition that a policeman or a fireman entering the premises of another in the course of duty is an invitee. The court said:

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[4] *Accord,* Schwab v. Rubel Corp., 286 N.Y. 525, 37 N.E.2d 234 (1941). The plaintiff in this case was a fireman who was injured when he fell into an opening in the floor of a building, while fighting a fire. An employee of one of the defendants had been using the opening to store equipment which he had dismantled just before the fire broke out. The court in determining the liability of the owner of the building and the buyer of the equipment explained it was clearly a question of fact whether there was an unusual hazard on the premises, whether such condition existed to the knowledge of both defendants, and if so, whether they gave the plaintiff a proper warning of the danger.

[5] Sanders v. Brown, 73 Ariz. 116, 238 P.2d 941 (1951); Laube v. Stevenson, 137 Conn. 469, 78 A.2d 693 (1951).

[6] 261 App. Div. 1067, 27 N.Y.S.2d 780, *aff'd,* 287 N.Y. 810, 41 N.E.2d 92 (1942).

[7] Jenkins v. 313–321 W. 37th St. Corp., 284 N.Y. 397, 31 N.E.2d 503 (1940).

[8] 4 App. Div. 2d 276, 164 N.Y.S.2d 276 (1957).

> Hence policemen and firemen must be treated neither as invitees nor as licensees, but as a special class *sui generis*. . . .[9]

Therefore, the duty owing to a policeman or fireman is not the same as the duty owing to an invitee. Instead, the court expressed the property owner's duty as follows:

> First, the owner is obliged to use reasonable care to keep in safe condition those parts of the premises which are utilized as the ordinary means of access for all persons entering thereon. Second, if the owner knows of the presence on the premises of officially privileged persons, such as firemen or policemen, is cognizant of a dangerous condition thereon, and has reason to believe that they are unaware of the danger, he has a duty to warn them of the condition and of the risk involved.[10]

There is still some doubt as to what rule the New York courts will follow, and this is evidenced by the concurring opinion in the *Beedenbinder* case. The concurring justice maintained that under some circumstances a fireman or a policeman in performing his public duty on the premises of another might be an invitee, and that in this case it could well have been a question for the jury to determine.

In view of the prior New York cases, the rule set forth by the majority of the court in the *Beedenbinder* case seems not only proper, but also the best approach to the problem. Under circumstances where public safety is involved, it is necessary that policemen and firemen enter private premises. When such circumstances exist, there is no need to consider whether there is an invitation or consent on behalf of the owner. The degree of care which is required on the part of a property owner should be measured by what is reasonable under the circumstances of the case, since the traditional rule of negligence law imposes such a standard. The property owner cannot be expected to keep that portion of his premises which is not normally used as a means of ingress and egress free from dangerous conditions, inasmuch as most individuals who enter the premises will enter by the usual means. The property owner should not reasonably have to anticipate an emergency which causes the policeman or fireman to enter the premises. Therefore, there should be no reason to anticipate that anyone, including policemen and firemen, will enter the premises by any but the normal passages.

Thus it can be concluded that the first duty under the New York rule as set forth by the court in the *Beedenbinder* case, that the owner is obliged to use reasonable care to keep in safe condition those parts of the premises which are utilized as the ordinary means of access for all persons entering there, is actually the duty of reasonable care and maintenance under any circumstances.

The second duty, as outlined by the court in the *Beedenbinder* case, that the owner must warn policemen or firemen if he knows of their ignorance of the existence of a dangerous condition and has an opportunity to warn them, is also a requirement that one must do what is reasonable under the circumstances.

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[9] *Id.* at 281, 164 N.Y.S.2d at 280.

[10] *Id.* at 281, 164 N.Y.S.2d at 281.

While it is clear from the New York decisions that policemen and firemen who enter upon private property in pursuit of their duty are not mere licensees, most jurisdictions hold otherwise. In the majority of the jurisdictions, their presence is authorized by virtue of a license conferred by law.[11] In a few jurisdictions, however, the courts have modified former rulings and have classified firemen and policemen as neither licensees nor invitees. These impose a duty similar to the second duty set forth in the *Beedenbinder* case, *i.e.*, that the owner must warn policemen and firemen who he knows are ignorant of a dangerous condition existing on the premises, of the fact that the condition exists.[12]

The landowner's general duties toward licensees applies to firemen and policemen, and therefore the landowner must refrain from wilful and wanton negligence toward them.[13] In the situation where the condition of the premises is the source of the harm, he is expected to exercise only the slightest degree of care.[14] No duty is owed to a licensee to keep the premises in a safe condition, because licensees must take the premises as they find them.[15] Nor does the owner have a duty to inspect the premises to discover defects or other dangerous conditions.[16] Even if the owner is aware of a dangerous condition, he will not be negligent if he may reasonably assume that the licensee will observe the danger.[17] It is obvious that the duty of care owing to policemen and firemen required by the court in the *Beedenbinder* case is certainly greater than the duty of care generally required toward licensees.

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[11] Carroll v. Hemenway, 315 Mass. 45, 51 N.E.2d 952 (1943). In this case, the plaintiff, a police officer, was injured when he fell into the unguarded and unlighted well of a freight elevator on the defendant's premises. The plaintiff entered the premises in the middle of the night to determine whether prowlers were present. The court ruled that the policeman was a licensee and was not entitled to recover for his injuries in the absence of wilful, wanton or reckless conduct on the part of the defendant. The court went on to explain that the defendant merely failed to remedy a defect, with no expectation that a stranger unacquainted with the premises would enter in the night time and be injured. Louisville & N. R. Co. v. Griswold, 241 Ala. 104, 1 So.2d 393 (1941); Steinwedel v. Hilbert, 149 Md. 121, 131 Atl. 44 (1925); Kithcart v. Feldman, 89 Okla. 276, 215 Pac. 419 (1923); Beehler v. Daniels, 18 R.I. 563, 29 Atl. 6 (1894); Burroughs Adding Mach. Co. v. Fryar, 132 Tenn. 612, 179 S.W. 127 (1915).

[12] Ryan v. Chicago & N.W. Ry. Co., 315 Ill. App. 65, 42 N.E.2d 128 (1942). In that case, a policeman, while attempting to apprehend a criminal, was run over by the defendant's train as a result of its negligent operation. The court held that the policeman was not a mere licensee, and, therefore, the defendant was obligated to use reasonable care not to injure him. The court distinguished two earlier Illinois cases, which held that policemen and firemen were licensees, and the occupier of the premises had only to refrain from wilful or wanton conduct towards them. The basis for distinguishing the cases was that the negligence present in the two previous cases had to do solely with the actual condition of the premises, while in the *Ryan* case the negligence was caused by the operation of the defendant's train. In Shypulski v. Waldorf Paper Co., 232 Minn. 394, 45 N.W.2d 549 (1951), the court reached a similar conclusion.

[13] Pincock v. McCoy, 48 Idaho 227, 281 Pac. 371 (1929). In that case a deputy sheriff, while attempting to make an arrest, fell into an unguarded and unprotected driveway at the rear of a building owned by the defendant and was injured as a result. The plaintiff claimed that the defendant was negligent in failing to place guards or railings along the driveway. The court ruled that the deputy sheriff was a mere licensee to whom the owner or occupant of the premises owed no duty other than to refrain from wilful or wanton injury.

[14] Hayes v. New Britain Gas Light Co., 121 Conn. 356, 185 Atl. 170 (1936).

[15] *Ibid.*

CONCLUSION

Policemen and firemen owe a duty to the public, and the right to enter private property is necessary in fulfilling this duty. They derive their right of entry from the law, and, therefore, they should be protected under the normal rules of negligence, *i.e.* what is reasonable under the circumstances, instead of being categorized rigidly as licensees. The duty of reasonable care requires reasonable precautions against foreseeable danger, and such a duty is imposed by the New York courts on the owner of property. The New York rule appears to be that the owner must use reasonable care in keeping the ordinary means of access to the property in a safe condition, and, if the owner knows of the presence of officially privileged persons and is aware of a dangerous condition on the premises, and has reason to believe they are not aware of the danger, he has a duty to warn them of the condition. The rule followed by most of the jurisdictions, that policemen and firemen are mere licensees to whom the owner of the property owes only the duty to refrain from wilful or wanton negligence, is a harsh and unnecessarily rigid one.

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[16] Hayes v. New Britain Gas Light Co., 121 Conn. 356, 185 Atl. 170 (1936); see RESTATEMENT, TORTS § 342, comment c at 932 (1934).

[17] Sanders v. Brown, 73 Ariz. 116, 238 P.2d 941 (1951).

MEASURE OF DAMAGES FOR BREACH OF IMPLIED WARRANTY BY TRANSFEROR OF A NEGOTIABLE INSTRUMENT

In an action for the breach of an implied warranty by the transferor or vendor of a negotiable instrument, both the nature of the remedy and the measure of damages to be recovered are matters of great uncertainty. This is no less true under the Negotiable Instruments Law and the Uniform Commercial Code than it was at common law. In spite of this, very little has been written on the subject, and the majority of courts have decided such warranty cases with no more than a passing glance at the damages question.

Three discrete rules have been suggested or applied to ascertain the damages in these actions. The first, prevalent in the early decisions[1] and still followed in a majority of jurisdictions,[2] allows the transferee or indorsee to recover what he paid for the instrument. The second, modeled upon the rule of damages applicable in actions for breach of warranty of quality arising from the sale of goods,[3] allows the purchaser of the negotiable instrument to recover the difference between the value of the instrument as sold and what its value would have been had the warranty not been breached.[4] The third rule, advocated by Professor Britton[5] but largely neglected by the courts,[6] would permit the purchaser to recover the face amount of the instrument. In addition to the damages measured by the above rules, the purchaser is allowed to recover the costs incurred by him in suing the primary obligor, the costs of his unsuccessful actions against antecedent parties, the costs of successful actions brought against him by his vendee,[7] and all other damages that are incidental to and result from the breach of warranty.[8]

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[1] Smeltzer v. White, 92 U.S. 390 (1875); Raplee v. Morgan, 3 Ill. 561 (1840); Smith v. McNair, 19 Kan. 330 (1877); Turnbull v. Bowyer, 40 N.Y. 456 (1869); Cook v. Clark, 4 E. D. Smith 213 (N.Y.C.P. 1855); Gompertz v. Bartlett, 2 Ell. & Bl. 849, 118 Eng. Rep. 985 (1853); Jones v. Ryde, 5 Taunt. 487, 128 Eng. Rep. 779 (1814).

[2] Citizens' Bank & Trust Co. v. Cook, 9 La. App. 540, 121 So. 306 (1928); Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943); Seaboard Sur. Co. v. First Nat'l City Bank, 15 Misc. 2d 816, 180 N.Y.S.2d 156 (N.Y. City Ct. 1955); Yates v. Bain, 162 S.W.2d 143 (Tex. Civ. App. 1942); Houston v. Lawhead, 182 S.E. 780 (W.Va. Ct. App. 1935).

[3] UNIFORM SALES ACT § 69(7); N.Y. PERSONAL PROPERTY LAW § 150(7). See Bond Elec. Corp. v. Gold Seal Elec. Co., 271 N.Y. 461, 3 N.E.2d 594 (1936); Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931).

[4] McNaghten Loan Co. v. Sandifer, 137 Kan. 353, 20 P.2d 523 (1933); Giffert v. West, 33 Wis. 617 (1873).

[5] Britton, *The Liability of a Transferor by Delivery and of a Qualified Indorser*, 42 YALE L.J. 25, 35 (1932).

[6] This rule has not been applied often by the courts. In McFarling v. Carey, 149 S.W. 766 (Tex. Civ. App. 1912), the court utilized this measure of damages, but the case was subsequently overruled by Doolen v. Hulsey, 192 S.W. 364 (Tex. Civ. App. 1917). Another case in which this rule seemed to be applied is Hartsfield v. Pace, 189 Ky. 93, 224 S.W. 647 (1920). It is important to note that the above cases involved fraudulent representations on the part of the defendant transferor.

Before these three rules are discussed, it seems advantageous to make a few general observations. Except in one instance,[9] the transferor's liability as a warrantor under the Negotiable Instruments Law and the Uniform Commercial Code is not dependent upon his knowledge of the defect which invalidates or diminishes the value of the bill or note. Nor in any case is it a condition to liability for breach of warranty that the vendor make affirmative false or fraudulent misrepresentations. However, if such misrepresentations are knowingly made, the vendee may sue either for breach of warranty or for fraud and deceit. Since the warranty action is in many ways inclusive of the action for deceit, distinctions between the two are not always made in the decisions. Even when the courts ostensibly recognize the difference, the two causes of action are usually treated alike.[10]

The vendor's warranty liability should also be distinguished from the liability that an unqualified indorser undertakes by virtue of his contract of indorsement.[11] The promise of the unqualified indorser, although seldom written out in full on the instrument, is that he will pay the face amount of the instrument if the drawee or maker does not, provided that due presentment has been made and that timely notice of dishonor has been given.[12] Thus, he becomes a conditional guarantor of payment. The essential element of his undertaking is that he vouches for payment of the instrument. On the other hand, as warrantor of the instrument, he impliedly represents that certain facts regarding it exist.[13] Thus, he promises to indemnify the vendee if these represented qualities are not, in fact, present.[14]

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[7] Britton, *supra* note 5, at 36. *But see* Whitney v. National Bank, 45 N.Y. 303 (1871), where the court held that the plaintiff vendee, who defended a successive vendee's action against him on the defense of want of consideration, cannot recover the costs of that action since these costs were not the necessary result of the breach of warranty of the genuineness of the note transferred.

[8] Whitney v. National Bank, 45 N.Y. 303, 304 (1871). The court said, "The damages that may be recovered in an action upon a warranty are those, and only those, that are incident to, and result from, the breach of warranty."

[9] UNIFORM NEGOTIABLE INSTRUMENTS LAW, § 65(4). "Every person negotiating an instrument by delivery or by a qualified indorsement, warrants that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless." See generally UNIFORM NEGOTIABLE INSTRUMENTS LAW §§ 65, 66; N.Y. NEGOTIABLE INSTRUMENTS LAW §§ 115, 116; UNIFORM COMMERCIAL CODE § 3–417. See generally BRITTON, BILLS AND NOTES §§ 246–257 (1943).

[10] Delaware Bank v. Jarvis, 20 N.Y. 226 (1859). *But see* Doolen v. Hulsey, 192 S.W. 364 (Tex. Civ. App. 1917). In this case, the vendor represented the note as "good as gold." Since the note was indorsed without recourse, the court felt that the plaintiff's remedy was either for rescission or an action for damages based on the fraudulent representations which induced the plaintiff to purchase the note. Thus, the plaintiff was entitled to recover what he paid for the note or damages for fraud which would equal the difference between the face value of the note and the value of consideration paid for the note.

[11] BRITTON, BILLS AND NOTES § 258 at 1023 (1943). "The difference between the two forms of liability is important. An action on the indorser's special contract of indorsement is conditioned on presentment, notice and protest; his liability for breach of warranty is not so conditioned. Again, the action on the special engagement cannot be brought until maturity of the instrument, while the action for breach of warranty, occurring as it does at the time of the transfer, may be brought at any time."

[12] UNIFORM NEGOTIABLE INSTRUMENTS LAW §§ 65, 66; N.Y. NEGOTIABLE INSTRUMENTS LAW §§ 115, 116.

To return to the analysis of the question of damages: The first rule, which allows the indorsee or vendee to recover only the amount paid for the instrument, is derived from the English cases. In *Jones v. Ryde*,[15] the court treated the action as one for money had and received. Since both parties were mistaken at the time of the purchase in thinking that it was a valid bill, whereas actually it was a forgery, the court required the vendor to refund what he was paid for it. In *Gompertz v. Bartlett*[16] and in *Gurney v. Womersley*,[17] King's Bench Division allowed the vendees of the negotiable instruments exactly the same remedy by granting judgments permitting them to recover what they had paid for the instruments. The early New York decisions adopted the measure of damages set forth in the *Jones* case,[18] and this appears to be the measure of damages currently applied by the courts of that jurisdiction.[19] In general, the opinions avoid a discussion of the measure of damages by saying that it is settled law that this is the correct rule of damages.[20]

Although the above measure of damages is applied by a majority of the courts, there is confusion among this majority as to the nature of the vendee's remedy. The English decisions discuss the action as one for money had and received.[21] However, they indicate that the remedy is rescission. This is grounded by implication in the rationale that since the plaintiff paid money to the transferee under a mutual mistake of fact, he should be permitted to recover the consideration he gave for the instrument. On the other hand, in *Smeltzer v. White*,[22] it was said: "In case of a breach of warranty, the person to whom the warranty has been given may sue without a return of the goods. He is not obliged to rescind the sale." [23]

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[13] *Ibid.*

[14] See generally Britton, *The Liability of a Transferor by Delivery and a Qualified Indorser*, 40 YALE L.J. 215 (1930), 42 YALE L.J. 25 (1932).

[15] 5 Taunt. 487, 128 Eng. Rep. 779 (1814).

[16] 2 Ell. & Bl. 849, 118 Eng. Rep. 985 (1853).

[17] 4 Ell. & Bl. 132, 119 Eng. Rep. 51 (1854).

[18] In Cook v. Clark, 4 E. D. Smith 213 (N.Y.C.P. 1855), the plaintiff paid $205 for a note with face value of $250. In his action against the accommodation indorser, he was only entitled to recover $220, the amount paid plus interest. See Delaware Bank v. Jarvis, 20 N.Y. 226 (1859); Cram v. Hendricks, 7 Wend. 569 (N.Y. Ct. Err. 1831); Judd v. Seaver, 8 Paige 548 (N.Y. Ch. 1841); Braman v. Hess, 13 Johns. R. 52 (N.Y. Sup. Ct. 1816).

[19] Seaboard Sur. Co. v. First Nat'l City Bank, 15 Misc. 2d 816, 180 N.Y.S.2d 156 (N.Y. City Ct. 1955). In that case, a check was made out for $4.72. It was then altered for $4,720 and indorsed by the defendant. The plaintiff recovered a judgment for $4,715.28 plus interest, which indicates that he recovered the amount paid for the note. *But see* Northeast Discount Corp. v. Queens Hill Motors, Inc., 150 N.Y.S.2d 848 (App. T. 1956), where the court was apparently enforcing an agreement by the vendor that if any warranty was breached, the vendor would repurchase the note and pay not less than the amount due on the note.

[20] Ingalls v. Lee, 9 Barb. 647, 651 (N.Y. Sup. Ct. 1850): "It is now settled, that an indorsee, who buys a note at less than its face, can recover against the indorser no more than the sum for which he bought the note, with interest. . . ." See cases cited notes 1, 2, *supra*.

[21] See cases cited notes 15, 16, 17 *supra*.

[22] 92 U.S. 390 (1875).

The position taken by the *Smeltzer* case provides the better rule where the instrument is valueless because a requirement that the bill or note be tendered to the defendant would serve no useful purpose.[24] However, where the instrument appears to have some value, the plaintiff should be required to return it before he may recover a judgment, since the defendant may have causes of action based upon the instrument against prior parties, and it is only equitable that he be given the opportunity to pursue these remedies.[25] In no instance, however, should the plaintiff be required to tender the instrument back as a condition precedent to the commencement of an action for breach of warranty.[26]

Another distinction between an action for rescission and one for breach of warranty is made in the case of *Trustees of Broaddus Institute v. Siers*,[27] where the court said that in an action for rescission, the assignee or vendee could sue only his vendor, but that in an action for breach of warranty he could sue all prior indorsers. With the exception of these cases, most of the opinions do not distinguish between the two remedies, but rather refer indiscriminately to the remedy as an action for breach of warranty and as one for rescission or for money had and received.[28]

The second rule of damages is evidenced in *Giffert v. West*.[29] In a previous action, the plaintiff had sued a prior indorser of the note who maintained a successful defense based upon usury. The plaintiff then commenced this action alleging a breach of West's implied warranty that the instrument had not been given as part of an illegal transaction. In discussing the measure of damages, the court suggested that the defendant, not having warranted the solvency of prior indorsers, should not have to pay damages for the breach of warranty as to an indorser's signature if such indorser was insolvent. The court was impressed by the fact that the plaintiff could not have collected from an insolvent indorser if the warranty had not been breached. At this point, the court drew the following analogy:

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[23] *Id.* at 395.

[24] See Tackett v. Mutual Realty Co., 143 S.W. 347, 348 (Tex. Civ. App. 1912): "In such case, of course, the notes would be worthless, and need not be tendered back; but such is not the case here."

[25] See Tackett v. Mutual Realty Co., *supra* note 24.

[26] In Smeltzer v. White, 92 U.S. 390, 395 (1875), the court stated that the following charge to the jury was in strict accordance with all the well-considered decisions: " 'It is not necessary thus to recover that the plaintiff should, before suit was brought, have tendered back the warrants mentioned in said written guaranties. It is enough that they are in the court at trial . . . .' "

[27] 68 W.Va. 125, 69 S.E. 468 (1910).

[28] For cases which discuss the vendee's remedy for breach of warranty as one in rescission, see Doolen v. Hulsey, 192 S.W. 364, 367 (Tex. Civ. App. 1917), where the court stated: "But the remedy is either for rescission or in an action for damages on account of the fraudulent misrepresentations inducing the contract . . . ." Kennedy v. Hudson, 224 Ala. 17, 138 So. 282 (1931); Smith v. McNair, 19 Kan. 330 (1877); Tackett v. Mutual Realty Co., 143 S.W. 347 (Tex. Civ. App. 1912). See also Citizens' Bank & Trust Co. v. Cook, 9 La. App. 540, 121 So. 306 (1928), which indicates that under the Louisiana Code, breach of warranty gives rise to a right to rescission. Compare Lunt v. Wrenn, 113 Ill. 168 (1885), which classifies the vendee's remedy as a right to recover purchase money because of a failure of consideration. In Franklin Square Nat'l Bank v. Great Atl. Bldg. Material Supply Corp., 186 Misc. 524, 60 N.Y.S.2d 352 (Sup. Ct. 1946), the court calls it an action for money had and received.

[29] 33 Wis. 617 (1873). See Thrall v. Newell, 19 Vt. 202 (1847).

> In an action for breach of warranty on a contract of sale of chattels, the measure of damages is the difference between the value of chattels, if they had corresponded with the warranty, and their actual value . . . No reason is perceived, all other circumstances being equal, why this familiar rule is not as applicable to a breach of warranty on the sale of a chose in action as to one on the sale of goods or other personal property.[30]

Thus, the court formulated the rule that the correct measure of damages is the difference between the actual value of the note where the prior indorsement is not enforceable and what its value would have been had that indorsement been valid.[31]

That the application of this rule presents problems is exemplified by *McNaghten Loan Co. v. Sandifer.*[32] The defendant vendor of the note indorsed it without recourse and sold it to the plaintiff. The note was purportedly made by a man and his wife, but the name of the wife had been forged. Plaintiff brought an action for breach of warranty of genuineness. The court drew an analogy between the warranties on the sale of chattels to those on the sale of negotiable instruments and applied the same rule as was set forth in the *Giffert* case. The makers in the *McNaghten* case owned $300 worth of household goods which would have been exempt from execution under local law unless both spouses were liable on the note. Otherwise, both makers were insolvent. The court held that the value of the $1,230 note, had the warranty not been breached was $300, which was the value of the property that could have been reached to satisfy a judgment running against both makers; that its present value was nothing; and therefore, that the plaintiff was entitled to a judgment of $300.

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[30] Giffert v. West, *supra* note 29 at 625.

[31] See Coolidge v. Brigham, 42 Mass. (1 Met.) 547, 553 (1840), where the court said that "the measure of damages will be the difference between the amount of the note and its actual value, whatever that may be." This statement is ambiguous, for the court may imply that there is a presumption of solvency in the absence of evidence to the contrary, and thus the face amount of the instrument is equal to the value of the note had the warranty not been breached. However, the court may have meant that vendee may recover the face amount of the note if an instrument having some value is returned, and thus the measure of damages would be in accord with the third rule.

[32] McNaghten Loan Co. v. Sandifer, 137 Kan. 353, 20 P.2d 523 (1933). The court attempted to distinguish this case from those of Smith v. McNair, 19 Kan. 330 (1877), where forged school district bonds were sold by the vendor who was held liable for the amount he received for them, and Robertson v. Talley, 84 Kan. 817, 115 P. 640 (1911), where the vendor innocently delivered a forged deed to a purchaser and was held liable for the amount paid, by stating: "Here the very fact that defendant declined in writing to guarantee this note showed the solvency of the makers was questionable and his offer to aid the plaintiff in collecting it made its value from that very moment uncertain. The breach of warranty only lost the plaintiff what he could have recovered if the wife's signature had been genuine as represented." McNaghten Loan Co. v. Sandifer, *supra* at 257, 20 P.2d at 526.

The difficulty with this solution is that the court assumed the note to be valueless as sold and worth only $300 if the warranty had not been breached. In the absence of a bankruptcy discharge of the two makers, it is impossible to support this assumption since every judgment, although not immediately collectable, does have some value. In the *McNaghten* case, the plaintiff did have a valid subsisting judgment against the maker, whose signature was not forged, and the possibility of collecting upon it sometime in the future should have been considered by the court.[33] But even if the court had regarded this possibility in estimating the plaintiff's damages, it is obvious that it would be very difficult to evalute accurately such a possibility.

The third rule of damages is perhaps the easiest of the three to apply. It is advocated by Professor Britton but has met with little acceptance by the courts. He states:

> An indorsee of a negotiable instrument who acquires title from an unqualified indorser at a discount, in the event of dishonor, may recover from the indorser the full face value of the instrument. The same rule should obtain where the transferee by delivery or indorsee from a qualified indorser sues for breach of warranty. . . . [This] . . . rule which permits the purchaser to recover from the seller the full face value of the instrument, where it was obtained at a discount, seems preferable.[34]

In comparing the three rules which have been propounded for determining the amount of damages recoverable in a warranty action, several principles must be examined in detail. First, the basic purpose of damages must be emphasized. Although in certain cases damages have been allowed as a form of punishment to the wrongdoer,[35] the primary object of awarding monetary damages is to provide just compensation or indemnity for the loss or injury suffered by the plaintiff.[36] The determination of the quantum of just compensation, however, must be made with some consideration of the position of the wrongdoer as well as that of the plaintiff. In this latter regard, the court of appeals of New York said in *Griffin v. Colver:* [37]

> The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and

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[33] See text accompanying note 44, *infra.*

[34] Britton, *The Liability of a Transferor by Delivery and of a Qualified Indorser,* 42 YALE L.J. 25, 35 (1932). See *supra* note 6.

[35] In Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867), the Court said: "The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed. In some instances he is made to bear part of the loss, in others the amount to be recovered is allowed, as a punishment and example, to exceed the limits of a mere equivalent."

[36] Hetzel v. Baltimore & O.R.R., 169 U.S. 26 (1898); Magnin v. Dinsmore, 62 N.Y. 35 (1875); Baker v. Drake, 53 N.Y. 211 (1873).

[37] 16 N.Y. 489 (1858). See Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

> they must be certain both in their nature and in respect to the cause from which they proceed.[38]

Although that statement was directed to contract damages, it should be noted also that the amount of damages which are recoverable should not be affected by the question of whether the action for breach of warranty lies in tort or contract. As the court stated in *United States Trust Co. v. O'Brien:* [39]

> It is clear and so it has been held in many cases, that the rule of damages should not depend on the form of action. In all civil actions, the law gives or endeavors to give a just indemnity for the wrong which has been done to the plaintiff, and whether the act was of the kind designated as a tort or one consisting of a breach of contract, is on the question of damages an irrelevant inquiry.[40]

Since the rule enunciated by the court in the *Griffin* case requires the damages to be within the contemplation of the parties at the time of the event giving rise to the cause of action, the intention of the parties existing when the instrument is sold has a definite bearing on the amount of damages which are recoverable. The intention of both the vendor and the vendee must be assumed to be that the transferee will eventually collect on the instrument, or, at least, that the transferee will have a valid cause of action against prior parties based upon their contractual obligation which will allow him to recover a judgment for the face amount of the note or bill of exchange. Except for the cases where the seller has made fraudulent representations or knows of some defense to the instrument, both parties believe the note is genuine, and the thought that a breach of warranty may occur probably never enters the mind of either. If the intention of the parties as to the effect of their act is the sole test for determining the amount of damages, it would seem that the rule suggested by Professor Britton is correct. Other factors, however, should be given weight.

The vendor of a negotiable instrument does not warrant that the instrument will be paid at maturity.[41] In the absence of a general indorsement giving rise to liability flowing from the contract of indorsement as distinguished from the transferor's warranty liability, the risk that the instrument may not be paid is on the purchaser.[42] The purpose of the implied warranties established by the law merchant and codified in the Uniform Negotiable Instruments Law and the Uniform Commercial Code is not to shift this risk to the vendor, but rather to guarantee to the purchaser that the instrument is a legally enforceable obligation which will form the gravamen for a cause of action against all prior parties.

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[38] 16 N.Y. at 494–95.

[39] 143 N.Y. 284, 38 N.E. 266 (1894).

[40] *Id.* at 287–88, 38 N.E. at 267.

[41] See Giffert v. West, 33 Wis. 617 (1873); McNaghten Loan Co. v. Sandifer, *supra* note 32. See text accompanying notes 29, 32, *supra.*

[42] *Ibid.*

If Professor Britton's suggested rule of damages is followed, the vendee will receive what amounts to a windfall in certain cases. Where the instrument has been transferred by delivery or through a qualified indorsement, and a warranty has been breached, recovery will be for the face amount of the instrument, even though the party, whose liability is nonexistent because of the breach, could not have paid had he been liable. For example, if the person whose name appears as maker on a note is insolvent and incapable of paying any of his obligations, and the note is transferred by delivery, the transferee would have no possibility of recovering immediately on the note if the signature were valid. However, if the person's name is forged, recovery of the full face amount of the instrument is possible immediately, not from the ostensible maker, but from the transferor.

Assuming that the vendor had no knowledge of the forgery, such a rule effectuates a shifting of the risk from the vendee to the vendor, not for a business or social purpose, but solely because of a rule in the law of damages. If such a rule is to be applied, some sound reason for this allocation of the loss, which results in a penalty to the vendor, must be found. It may be argued that this rule is desirable as an incentive to the free transferability of negotiable instruments. Exception may be taken to this argument for two reasons. Transfer is effectuated only when there exists both a person who wishes to sell and one who desires to buy. There is no doubt that a potential vendee would be encourged to purchase the instrument by the prospect of recovering the full value of the instrument if a warranty is breached, but the contrary is to be expected from the seller.

In addition, the law of negotiable instruments has always provided for a means of limiting the liability of an indorser on his contract of indorsement. The qualified indorsement has proved a useful and expedient device in the commercial world. Although the imposition of Professor Britton's rule would neither affect the contractual liability of the vendor in this type of transfer, nor impose liability for the face amount of the instrument where there has not been a breach of warranty, it would increase the responsibility of the qualified indorser which would approximate that of a general indorser whenever a breach of warranty occurred.

That warranties may be disclaimed[43] should not affect the above arguments against this rule for measuring damages. Assuming the truth of the observation that the parties to the sale of negotiable paper seldom consider the possibility of a breach of warranty, and also the fact that the disclaimer of warranties is practically unknown in the commercial community, it is unreasonable to expect an educated use of such means to limit liability.

To avoid this shifting of loss which would result from the application of Professor Britton's rule, the *McNaghten* and *Giffert* cases followed a rule akin, if not identical, to that adopted in the Uniform Sales Act for measuring damages where there is a breach of warranty in the sale of a chattel.[44]

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[43] General Contract Purchase Corp. v. Alcorn, 226 Mo. App. 1026, 47 S.W.2d 162 (1932).

As has been noted previously,[45] the rule in the *McNaghten* case presents some difficulties in application. The principal task of the court in measuring damages under this formula is to ascertain the value which the instrument would have had if the warranty were not breached and the present value of the bill or note. It is true that the damages rule of the Uniform Sales Act requires the same determinations where a breach of warranty accompanies a sale of chattels, but with chattels the task is easier because the property's value is not subject to wide fluctuation in most cases. The value of a negotiable instrument, however, is dependent upon the ability of the persons liable thereon to pay. It is their financial status which is determinative of whether the promise or order evidenced by the note or bill will be honored, and this may vary widely from month to month or year to year.[46]

It should be noted that the *McNaghten* case fails to mention the remedy of rescission which is available to the vendee of a chattel where there has been a breach of warranty.[47] There are two possible reasons for this —the first being that the plaintiff probably neglected to request this specific relief. Secondly, in the sale of negotiable instruments, the necessity for rescission does not exist, where as rescission may be very important with respect to the sale of chattels. For instance, when a person buys a defective machine, he may not want to spend the time and money to repair it, or the machine may be so defective that it is impossible to have it adequately repaired. If he did not have an election to rescind the sale, he would suffer further detriment in having to keep the bulky chattel, which he would be compelled to store or sell. It is self-evident that a negotiable instrument does not present such problems.

In the above discussion of the different rules of damages, it was demonstrated that although the second rule is the best measure of damages with respect to the intentions of the parties and the underlying principles of damages, it cannot be accurately applied in all cases. It was also pointed out that the third rule gives the vendee a windfall if the intentions of the parties are considered.

This leaves only the majority, or first, rule of damages with which to contend. The first advantage of this rule is its ease of application. Also, it has the effect of restoring the parties to their original positions. It is a just rule because it adequately compensates the vendee for his loss, and the transferor only pays that which he received for the instrument. Although this rule does not purport to provide a measure of damages indicative of the intentions of the parties, it does present an effective compromise because the vendor now assumes the risk of insolvency of prior parties while the vendee's damages are limited to the amount he paid for the note.

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[44] UNIFORM SALES ACT § 69(7); N.Y. PERSONAL PROPERTY LAW § 150(7).

[45] See text accompanying note 32, *supra*.

[46] In Coolidge v. Brigham, 42 Mass. (1 Met.) 547, 553 (1840), the court said: "The measure of damages will be the difference between the amount of the note and its actual value, *whatever that may be*." (Emphasis added.) In Thrall v. Newell, 19 Vt. 202 (1847) the note was made by two co-makers, one of whom maintained a successful defense of insanity. The court said that the plaintiff's judgment against an indorser for breach of warranty must be reduced by the value of the note. The court said: "and as, for anything that has been made to appear, the note is valid against Philips, it cannot be taken to be of no value. *Whatever its value is against Philips*, the plaintiff cannot be said to have lost by the breach of warranty." *Id.* at 209. (Emphasis added.) These statements by the courts suggest that there is a problem in estimating the value of negotiable instruments.

[47] UNIFORM SALES ACT § 69(d); N.Y. PERSONAL PROPERTY LAW § 150(d).

Consideration must also be given to the question of whether the vendee should be given an election of remedies similar to the election afforded the vendee of a chattel under section 69 of the Uniform Sales Act. As was demonstrated previously, the vendee of a negotiable instrument has no need for the remedy of rescission. If this option were permitted, the vendee could select the second rule of damages where it would be more profitable to him. Yet he would not assume the risk inherent in the *McNaghten* and *Giffert* cases since he could elect the first rule whenever the maker or prior indorser was insolvent. Thus, such an election would diminish the compromise aspects of the first rule and part of the justice of this measure of damages.

In applying the majority rule, a question that may be presented is whether the measure of damages for breach of warranty should be the same for both the qualified and the general indorser. The argument can be made that since a qualified indorser attempts to limit his liability,[48] he should be given an advantage in the amount of damages assessed against him because, by refusing to guarantee payment unconditionally, he awakens the vendee to the fact that the note may not be collectible. By not attempting to limit his liability, the general or unqualified indorser may have led the vendee into thinking that the instrument is worth its face value. In view of that possibility, the argument proceeds, such an indorser should be liable for the full amount of the note.

The better argument seems to be *contra*. Since the basic purpose of the implied warranties is to provide for minimum protection against defects in the instrument, and since both types of indorsers make substantially the same implied warranties,[49] the measure of damages should be the same for either indorser where there is a breach of any of those warranties. If the indorsee desires to collect the face value of the instrument from an unqualified indorser, he may always make due presentment, give notice of dishonor, and sue on the contract of indorsement.

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[48] In Britton, Bills and Notes § 246 at 995 (1943), he states, "The liability of the qualified indorser and the vendor by delivery alone is that of a warrantor only. The liability of the unqualified indorser is both that of warrantor and that of a conditional promisor of payment."

[49] Uniform Negotiable Instruments Law, *compare* § 65(4) *with* § 66(2). See also Uniform Commercial Code § 3–417(2), and Britton, Bills and Notes, *supra* note 48, at 995 where he states: "There is no inherent reason why the warranties of a qualified indorser, of an unqualified indorser and of a transferor by delivery should not be identical. . . ."

Another problem may arise under this rule. Some of the courts which apply it say that the vendor is liable to refund the money which he received from the instrument; [50] others say the vendee may recover what he paid for it.[51] The difference between these statements of the rule is evident where the vendee is suing a remote indorser who received more or less for the instrument than the vendee paid for it. To clarify this statement, the following illustrations may be considered: (1) M is the purported maker of the note, but his name is forged. P sells this $100 note to A for $90, who in turn transfers it to B for $85. If B sues P, should he recover the amount he paid for the note or the amount P received for it? A just and equitable result would be to allow B to recover what he lost and not to give him the windfall. P should not be compelled to pay more than the loss sustained by B. (2) Assume the facts are the same, except that P sold the note for $85, and B paid $90 for it from A. Should B be allowed to recover $90, the amount he paid for it, or $85, the amount P received for it? It is true that B sustained a loss of $90, but if he had sued A, he could have completely recovered that loss. Since P and B are innocent parties, P should not be compelled to pay more than he received for the note; thus, B will have to sustain part of the loss in this situation.[52]

Therefore, a fair and equitable statement of the rule, as has been determined by the above examples, would seem to be that the measure of damages for breach of warranty arising from the sale of a negotiable instrument is equal to the amount the vendee paid for the instrument or the amount the vendor received for it, whichever is less.

As was suggested before, this rule would only apply where the vendor had no knowledge of the defect in the instrument. If the vendor has knowledge of the defect and induces the vendee to purchase the instrument, he should be penalized by having to pay the face value of the instrument.[53] Since this measure of damages would be in the nature of a penalty to help deter such practice in the future, it should be utilized even if he is being sued by a remote vendee. Whether this is accomplished by giving the vendee a separate cause of action for deceit [54] or by assessing punitive damages in the appropriate warranty action,[55] the basic damages rule should not be affected.

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[50] Citizens' Bank & Trust Co. v. Cook, 9 La. App. 540, 121 So. 306 (1928); Aldrich v. Jackson & Butts, 5 R.I. 218 (1858).

[51] Burmingham Nat'l Bank v. Bradley, 103 Ala. 109, 15 So. 440 (1894); Shaeffer v. Hodges, 54 Ill. 337 (1870); Whitney v. National Bank, 45 N.Y. 303 (1871); Yates v. Bain, 162 S.W.2d 143 (Tex. Civ. App. 1942). See 2 SUTHERLAND, DAMAGES, § 555, at 1873, where he states: "On the contrary, where recourse is had to an indorser the recovery on account of the principle sum is limited to the amount paid; in other words, there is a compulsory refunding of the consideration and interest thereon."

[52] These conclusions are based on the underlying principles of damages which were discussed previously.

[53] See *supra* note 35.

[54] It should be noted, however, that damages recoverable in an action for deceit do not include recovery for "loss of bargain" in some jurisdictions. See generally MCCORMICK, DAMAGES §§ 121–122a (1935). Where such a rule prevails, a plaintiff would obtain no advantage by suing in deceit.

Although a majority of the courts have adopted the first rule, the measure of damages awarded for a breach of warranty still constitutes a vague and confusing area in the law of negotiable instruments. It is unfortunate that the proposed Uniform Commercial Code contains no provision on this subject.

PHILIP J. DEVINE

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[55] However, punitive damages are generally not recoverable in contract actions. Clark v. New York, N.H. & H.R.R., 40 Misc. 691, 83 N.Y. Supp. 162 (App. T. 1903); McCORMICK, DAMAGES § 81 (1935). *But see* Simpson, *Punitive Damages for Breach of Contract,* 20 OHIO ST. L.J. 284 (1959), where he states: "In a small but growing minority of states, punitive damages are allowed in breach of contract cases where the breach is accompanied by a fraudulent act or some other intentional wrong, insult, abuse or gross negligence amounting to an independent tort, aggravated by malice, wantonness, or oppression."

Merger of Land Contract in Deed

What is the effect of a deed of conveyance, delivered and accepted as performance of a contract for the sale of real property, when the deed does not expressly incorporate covenants contained in the contract? The customary principle of law stated in reply to this question is that a contract for the sale of real property becomes merged in the deed and that the rights of the parties rest thereafter solely on the deed.[1]

There may be instances, however, where a stipulation in a contract instead of becoming merged in the deed survives it and confers an independent cause of action. The court, in allowing such actions, often states that certain contract provisions are to be considered as independent of or collateral to the agreement to convey the real property [2] or that it was not the intention of the parties to merge these provisions in the deed.[3] The purpose of this comment is to consider the New York cases dealing with the merger question in order to determine what facts or circumstances have influenced the courts in deciding whether a contract provision was merged in the deed and extinguished or survived delivery of the deed so as to be the subject of an independent action.

The courts have experienced little difficulty in deciding cases where the deed, although it contradicts or is inconsistent with contract provisions, mentions the same subject matter as is contained in the contract provisions. The courts have held in this situation that a merger occurred on the theory that where there are several writings relating to the same subject matter, the parties are deemed to have embodied their final agreement in the writing which supersedes all prior agreements.[4] Similarly, in cases where, although the deed is silent, the contract provides that certain provisions shall survive delivery of the deed, the courts have held that no merger resulted on the ground that it was the expressed intent of the parties that a merger should not occur.[5]

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[1] Houghtaling v. Lewis, 10 Johns. R. 296 (N.Y. Sup. Ct. 1813). The contract called for conveyance of a farm containing fifty-eight acres. Actually the farm contained only fifty-five acres. The court found that the deed was unconditionally accepted in satisfaction of the contract and that the contract thereupon became null and void. *Accord,* Schoonmaker v. Hoyt, 148 N.Y. 425, 42 N.E. 1059 (1896); Hunt v. Amidon, 4 Hill 345 (N.Y. 1842).

[2] Bull v. Willard, 9 Barb. 641 (N.Y. Sup. Ct. 1850).

[3] Disbrow v. Harris, 122 N.Y. 362, 25 N.E. 356 (1890); Price v. Woodward-Brown Realty Co., 190 N.Y. Supp. 561 (App. T. 1921), *aff'd,* 201 App. Div. 837, 192 N.Y. Supp. 947 (1922).

[4] Howes v. Barker, 3 Johns. R. 506 (N.Y. Sup. Ct. 1808). In the *Howes* case the court held that in case of a diversity between the price stated in the contract and the price stated in the deed, the contract merged in the deed. See 3 WILLISTON, CONTRACTS § 646 (rev. ed. 1936).

[5] Desz v. Lincoln Sav. Bank, 174 Misc. 263, 19 N.Y.S.2d 663 (App. T. 1940). The defendant-vendor, in this case, agreed in the contract to vacate a store tenant from adjacent premises which he also owned. There was an express provision in the contract that this covenant should survive delivery of the deed. Although the court, in an action brought by

In instances, however, where the deed is silent concerning certain subject matter contained in the contract and there is no express survival provision in the contract, the courts have experienced more difficulty in arriving at a reasoned decision. This difficulty was recognized by the court in the case of *Bull v. Willard,*[6] where the court said:

> It frequently becomes a nice and difficult question to determine whether covenants contained in an agreement for the sale of land, are collateral to those providing for the execution of the deed, or are so connected with it, as to be at an end and become merged or satisfied in the execution of the deed. I have not been able to fix upon a better criterion, upon that question, than that the covenant, in order to be deemed collateral and independent, so as not to be destroyed by the execution of the deed, must not look to or be connected with the title, possession, quantity or emblements of the land which is the subject of the contract; and that if it does so, the execution of the deed, in pursuance of the contract, will operate as an extinguishment of it.[7]

The cases to be considered in this comment indicate that of the four criteria established in the *Bull* case, only the one pertaining to title is applicable today. The courts, in decisions subsequent to the *Bull* case, have determined that it is possible to have independent contract provisions relating to possession, quantity and emblements when appropriate facts and circumstances are shown to justify a decision that these provisions were not intended to be merged in the deed.

Examples of cases where the courts have departed from the strict criteria established in the *Bull* case will be found throughout this comment as consideration is given to the particular facts and circumstances which have influenced the courts in determining whether or not a merger was intended. In some cases, the time in which the contract covenant is to be performed affords some guidance to the court in determining the particular intention of the parties. A leading case in which the time element played a decisive role is *Siebros Fin. Corp. v. Kirman.*[8] In that case the defendants purchased real property pursuant to a contract which gave them an option to resell to the vendor within a stated time. The defendants gave the vendor a purchase money mortgage which was assigned to the plaintiff. Subsequently, the defendant exercised the option and made a tender which the vendor refused to accept. Upon a default in mortgage payments, plaintiff brought an action to foreclose the mortgage, and defendants successfully

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the vendee on the contract provision, held that no merger occurred, the decision of the city court was reversed on appeal and a new trial granted to determine if the plaintiff had waived an anticipatory breach of the contract by accepting a deed with the knowledge that the adjacent premises had been sold to a third party who intended to relet to the present store tenant. *Accord,* Russ v. Lakeview Development, Inc., 133 N.Y.S.2d 641 (N.Y. City Ct. 1954). In the *Russ* case, the contract for the sale of a house provided that the vendor's guaranty against certain defects in construction should survive delivery of the deed. The court held that this clearly indicated that the parties intended that no merger should occur upon delivery of the deed.

[6] 9 Barb. 641 (N.Y. Sup. Ct. 1850).

[7] *Id.* at 645.

[8] 232 App. Div. 375, 249 N.Y. Supp. 497 (1931).

asserted the defense that they had tendered a deed of the property to the vendor under the resale agreement. Although the opinion is not completely clear on the dates involved, the defendants' brief indicates that defendants received their deed on December 21, 1926, and under the terms of the contract the option period for resale of the property was not to commence until January 1, 1930.[9] Defendants were successful in their argument that the option to resell was collateral since it could not be exercised until four years from the time of delivery of the deed and that delivery and acceptance of the deed was therefore only part performance of the contract.

The factual situation presented in the *Siebros* case indicates the need for vendees of real property and assignees of instruments pertaining to real property to be particularly observant of any contract provisions similar to the option found in the *Siebros* case that may be in their chain of title.[10]

The time element was also important in the case of *Morris v. Whitcher,*[11] in which a contract executed in October contained a covenant that the vendor might remain in possession until the following May. The deed was also executed in October, but it did not mention the right of the vendor to remain in possession. The vendee subsequently sold the property to the plaintiff who brought an action of ejectment against the original vendor. The court of appeals held that the agreement to retain possession was not merged in the deed and that evidence offered to establish the intention of the parties at the time of delivery of the first deed was improperly excluded.[12]

From the holdings in the *Siebros* and *Morris* cases, it seems well established that an express stipulation in the contract granting an option to resell the property and a stipulation setting forth the time when the vendee is to enter into possession of the property are not merged in a deed accepted by the vendee which is silent with respect to these contract provisions. Such factors are particularly important where it is shown that the time when the vendee was to assume possession of the property was a primary consideration inducing the parties to enter into the contract.[13]

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[9] Brief for Appellants, pp. 17–21, Siebros Fin. Corp. v. Kirman, 232 App. Div. 375, 249 N.Y. Supp. 497 (1931).

[10] See, Bellanca v. Jubiler, 62 N.Y.S.2d 874 (N.Y. Munic. Ct. 1946). The court in the *Bellanca* case held that a contract provision that the refrigerator and furnace on the premises were in good condition, but if not, they would be repaired within fifteen days of closing of title, did not merge in a subsequent deed delivered and accepted which was silent on this point.

[11] 20 N.Y. 41 (1859).

[12] *Accord,* Raguso v. Ferreira, 60 N.Y.S.2d 418 (Sup. Ct. 1946), where the court held that acceptance of a deed by the vendee did not preclude the vendee from bringing an action to compel the vendor to specifically perform a contract provision to move from the premises not later than a certain specified date.

[13] Miccio v. Steiglitz, 66 N.Y.S.2d 435 (Kings County Ct. 1946). The contract in the *Miccio* case involved the purchase of a house, possession of which was found by the court to have constituted a vital part of the consideration for the transaction. When the vendor failed to give possession in accordance with the contract provision, the vendee was allowed to sue for specific performance even though a further contract provision provided that a

The question whether a merger has occurred frequently arises in cases where the contract requires the vendor to perform other acts in addition to transferring title and possession to the vendee. The controversy usually arises when the vendor has failed to complete the acts called for by the contract or has not performed them to the satisfaction of the vendee. In the case of *Price v. Woodward-Brown Realty Co.*,[14] the court held that delivery of the deed was not necessarily a performance of the undertaking for the erection of a house in accordance with the provisions of the contract, even though the plaintiff-vendee had accepted the incomplete house. There was no indication that the court based its decision on any particular fact or circumstance surrounding the transaction. The only reason advanced by the court to justify its decision was that nothing was contained on the face of the complaint from which it could be inferred that the vendee accepted the incomplete house as performance of the contract stipulation. Although the result of the *Price* case does not seem particularly inequitable, the rationale of the decision is not clear.

In the leading case of *Disbrow v. Harris*,[15] however, the contract called for the vendor to deliver a house in good condition. When the deed was delivered, the vendee paid all but a small portion of the purchase price which he retained pursuant to an agreement with the vendor; the purpose of retaining this sum was to insure completion of a sidewalk and installation of certain grates. In a subsequent action by the vendor to recover the amount retained, the vendee's counterclaim for other defects in the house was denied. Such a denial was based on the theory that when the parties agreed that payment of the small sum retained was dependent only on performance of the few things specifically named, it must be assumed that they intended a satisfaction and merger of other contract provisions relating to the condition of the house.[16] It is interesting to note that in the *Price* and *Disbrow* cases, it appears that the less diligent vendee at the time of delivery and acceptance of the deed was in a better position to assert that no merger occurred and to succeed in an action brought on the contract provision.

The somewhat questionable reasoning of the *Price* case was followed by the court in the case of *Terry v. Raif*,[17] in which the contract called for certain grading work to be performed *prior* to closing of title and *prior* to delivery of the deed. Some grading work had been done when plaintiff-vendee accepted a deed. Subsequently, plaintiff-vendee commenced an action on the contract for damages incurred by the defendant's failure to

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certain sum should be paid by the vendor for each month that he failed to deliver possession.

[14] 190 N.Y. Supp. 561 (App. T. 1921), *aff'd*, 201 App. Div. 837, 192 N.Y. Supp. 947 (1922).

[15] 122 N.Y. 362, 25 N.E. 356 (1890).

[16] *Accord*, Zanphir v. Bonnie Meadows, Inc., 127 N.Y.S.2d 269 (Sup. Ct. 1953), where an intent to effect a merger of a contract provision containing covenants for proper construction of a house upon the property was held to be shown by the execution of an escrow agreement at the time when title passed leaving a portion of the purchase price in escrow pending completion of certain stated items of construction.

[17] 205 Misc. 1059, 130 N.Y.S.2d 159 (Broome County Ct. 1954).

complete the grading work. The court, in reliance on the *Price* case, held that there was an absence of evidence to show any intention on the part of the plaintiff to waive the grading provisions of the contract. The provisions of the contract calling for completion of the work *prior* to closing and *prior* to delivery of the deed were held to be mere statements as to time of performance which might be waived by the plaintiff, but such waiver did not necessarily indicate an intent to waive performance.

It is possible that the courts in deciding the *Price* and *Terry* cases were influenced by a dictum of the court of appeals in the case of *Disbrow v. Harris* [18] to the effect that in the absence of evidence on the subject there is no presumption of any intention to relinquish benefits reserved in the contract or that stipulations relative thereto are satisfied by the conveyance. The dictum asserted in the *Disbrow* case is in conflict with the rule established in the earlier case of *Houghtaling v. Lewis* [19] where the court asserted that acceptance of a deed raises a prima facie presumption of law that such acceptance is an execution of the entire contract. If future cases dealing with the merger problem are to be decided solely on negative reasoning that merger will be denied when there is no evidence to indicate that the vendee intended to waive the contract provisions, it is submitted that such decisions should be confined to cases where there is a clear absence of any fact or circumstance which would allow an inference that the parties intended or did not intend a merger.

In the case of contract covenants relating to warranties of title and freedom from encumbrances, the courts have uniformly held that upon execution and delivery of a deed, stipulations of the antecedent contract will, in the absence of fraud or mistake, become merged in the deed.[20] One who contracts to buy land may refuse to accept a deed if title is defective, but once the deed is accepted, the vendee has no remedy for defects of title except as provided by covenants in the deed. In the absence of such covenants, therefore, the vendee is unable to obtain redress even though the vendee receives no title. Suit by the vendee cannot be maintained on either a basis of implied warranty, or failure of consideration.[21]

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[18] 122 N.Y. 362, 25 N.E. 356 (1890).

[19] 10 Johns. R. 296 (N.Y. Sup. Ct. 1813).

[20] Whittemore v. Farrington, 76 N.Y. 452 (1879); Lambert v. Krum, 121 Misc. 170, 200 N.Y. Supp. 452 (Sup. Ct. 1923). The *Lambert* case contains a good review of the authorities.

[21] Johnson v. State, 188 App. Div. 33, 175 N.Y. Supp. 784 (1919). By accepting a quitclaim deed, the vendee was held to have waived any remedy he had against the vendor in relation to tax liens on the property. *Accord,* Wheeler v. State, 190 N.Y. 406, 83 N.E. 54 (1907); Andrew D. Baird Holding Corp. v. Burns Bros., 209 App. Div. 601, 204 N.Y. Supp. 820 (1924); County Sec., Inc. v. Warwick Properties, Inc., 176 Misc. 272, 24 N.Y.S.2d 971 (Sup. Ct. 1940), *aff'd,* 263 App. Div. 964, 33 N.Y.S.2d 825 (1942). In Sage v. Truslow, 88 N.Y. 240 (1882), however, the court held that an agreement in the contract whereby the vendee was to pay certain back taxes was not merged in a deed silent on the subject since the agreement to pay the taxes was part of the consideration for the conveyance. The court found that it was not a mere covenant to indemnify, but an absolute undertaking to pay. *Cf.* Remington v. Palmer, 62 N.Y. 31 (1875). The court in the *Remington* case held that an oral promise made by the vendor at the time of delivery of a deed that he would pay a tax assessment upon the premises when it came due, if the vendee would accept

One writer defends the severity of such a rule on the theory that in conveyances of land the parties set forth their entire agreement in the deed, at least with references to title, and that warranty provisions are inserted where the parties intend that the vendor shall be liable for defective title.[22]

A study of the cases indicates that there is, in effect, a conclusive presumption of merger in regard to covenants involving title.[23] In contrast to this, there appears to be no presumption of merger in regard to contract covenants which do not pertain to title, and in the absence of evidence as to the intent of the parties, the burden is placed on the party claiming a merger to show that a merger was intended.[24]

Although the question of merger arises in many of the cases dealing with discrepancies in the quantity of land conveyed, most of the decisions in such cases turn on the question whether reformation or rescission should be granted because of the fraud or mistake of one or both of the parties, or on the question whether a sale in gross or a sale per acre was intended.[25] In certain cases of this type, however, a consideration of the question of merger has been of primary importance.

In *Murdoch v. Gilchrist,*[26] plaintiff's assignor contracted to purchase a farm from defendants which was supposed to contain one hundred acres at a price of forty-four dollars per acre. Prior to delivery of the deed, the vendees, relying on the representation as to quantity paid $4,400. The deed stated the consideration as $4,400 and recited the quantity as "ninety-eight and twenty-six one hundredths acres, more or less." Plaintiff called defendants' attention to the discrepancy and an oral agreement was entered into whereby plaintiff accepted the deed upon defendants' promise that the quantity of land should be subsequently ascertained and the purchase price adjusted on the basis of the contract. Upon surveying the land it was found to contain only eighty-nine acres and plaintiff was allowed to recover the excess purchase price paid. The court found that no merger occurred when plaintiff accepted the deed because plaintiff's right to the land upon payment of a fixed price per acre rested upon the original contract and that the oral agreement which was made when the deed was delivered was not a parol agreement offered to modify or contradict a written instrument. The court held that the parol agreement was material only for the purpose of rebutting any presumption that the purchasers assented to any change in the contract by accepting the deed.[27]

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the deed and pay the purchase price, was a valid and binding promise. The court concluded that an action could be maintained thereon.

[22] 4 Williston, Contracts § 926 (rev. ed. 1936).

[23] See cases note 20 *supra.*

[24] Price v. Woodward-Brown Realty Co., 190 N.Y. Supp. 561 (App. T. 1921), *aff'd,* 201 App. Div. 837, 192 N.Y. Supp. 947 (1921). Terry v. Raif, 205 Misc. 1059, 130 N.Y.S.2d 159 (Broome County Ct. 1954).

[25] Paine v. Upton, 87 N.Y. 327 (1882) (action to reform the contract on the ground of mutual mistake); Wilson v. Randall, 67 N.Y. 338 (1876) (no evidence that a sale per acre was intended); Bennett v. Judson, 21 N.Y. 238 (1860) (action for fraud based upon false and fraudulent representations as to location and quality of western lands).

[26] 52 N.Y. 242 (1873).

[27] *Cf.* Witbeck v. Waine, 16 N.Y. 532 (1858). In the *Witbeck* case the court held that

Further consideration of the problem of merger is found in cases in which the contract, but not the deed, purports to reserve certain fixtures to the vendor. It is generally held that such contract provisions do not merge in the deed. In the case of *Brunswick Construction Co. v. Burden,*[28] defendant-vendor contracted to sell a certain building to plaintiff's assignor. The contract expressly reserved to defendant the right to remove all fixtures attached to the premises and this contract was subsequently assigned to the plaintiff. The deed given by defendant to plaintiff contained no reservation with respect to the right to remove fixtures. The defendant remained in possession for one month under an oral agreement and proceeded to remove the fixtures. The plaintiff brought an action to recover for damage done to the freehold by removal of the fixtures, claiming that the contract provision merged in the deed. The court, in finding for the defendant, indicated that the contract provision remained executory and could be viewed either as a constructive severance of the fixtures from the freehold and a reservation of title in defendant, or as an option or privilege to defendant to remove the fixtures.

The interesting feature of the *Brunswick* case is the dictum advanced by the court to the effect that if the defendant had surrendered possession without having removed the fixtures it might well be claimed that he had abandoned his right thereto. It may be contended that had this been the case, the court would have found that a merger had occurred on the ground that the vendor had merely reserved an option to remove the fixtures and had relinquished the option by failing to make provision for their removal prior to delivery of the deed. On the other hand, if the contract provision can be characterized as a constructive severance of the fixtures and a reservation of title in the vendor, it is difficult to see under what theory a merger can be claimed. If, as the court stated, the decision could be justified either on the basis of a constructive severance *or* an option to remove, it would seem that failure of the vendor to provide for removal of the fixtures prior to delivery of the deed should not determine whether he has lost this right, since title to the fixtures remained in the vendor and his silence at the time of conveyance should not operate to divest the vendor's title.

The case of *Tyson v. Post* [29] held that an oral agreement between vendor, vendee and a third-party named Post, to the effect that title to certain fixtures would be transferred to Post as security for advancing to the vendee the necessary down payment to purchase the premises is enforceable in a subsequent action by the vendor to foreclose a mortgage given by the vendee to secure the balance of the purchase price, even though

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the execution and delivery of a deed by a vendor, pursuant to a contract for the sale of land, where a portion of the purchase money remained unpaid, does not extinguish the contract in respect to a provision therein for an increase or rebate of the purchase money in proportion to any excess or deficiency which might exist in the quantity of land. The court reasoned that the general rule that a written contract supersedes all prior negotiations and agreements upon the same subject was not applicable where the last contract covers only a part of the subjects embraced in a prior one.

[28] 116 App. Div. 468, 101 N.Y. Supp. 716 (1906).

[29] 108 N.Y. 217, 15 N.E. 316 (1888).

the deed and mortgage were silent as to the fixtures. The court held that since Post was not a party to the mortgage it was not material to inquire whether the deed from vendor to vendee and the purchase money mortgage embraced or was intended to embrace the fixtures in question.

Since the holding of the *Tyson* case is, in effect, that there may be a constructive severance of fixtures with title transferred to a third person, there seems to be no sound reason why a vendor should not be able to make such a constructive severance in his own behalf by a contract provision. In view of the decision in the *Brunswick* case, it seems that such a provision does not merge in a subsequent deed which is silent on the subject. It follows, therefore, that a subsequent purchaser from the immediate vendee who finds such a contract provision in his chain of title should determine if the preceding vendor has removed the fixtures to which he retained title. This determination would seem particularly important when the vendee has made an immediate resale of the premises, for the original vendor may subsequently assert a right to enter on the land for the purpose of removing the fixtures to which he retained title.

In conclusion, it is difficult to draw an exact principle or rule for the guidance of conveyancers in determining whether or not a particular contract provision will merge in the deed. The merger situation does, however, present an instance where the parties can avoid future litigation merely by exercising care in drafting the contract and the deed. The parties should spell out their intention by means of a specific provision in the deed or by stating in the contract that certain provisions are intended to survive delivery of the deed. It is only when the parties fail to set forth their intention that a court must determine whether the deed was delivered and accepted in satisfaction of all contract provisions.

In litigating the question of whether a merger occurred, an examination of the type of contract provision in question renders little assistance. In the absence of evidence from which a specific intent may be determined, the court will characterize nearly any type of contract provision as independent and collateral to the contract to convey. If the court concludes that there is nothing on the face of the complaint from which it can be inferred that a merger was intended, the decision is likely to be in favor of the party claiming that no merger occurred.

Upon considering the cases mentioned in this comment, it appears that the party claiming that a merger occurred is likely to receive a favorable determination only where the contract provision comes within the purview of covenants relating to title in a deed, and in situations where the deed, although inconsistent with the contract, covers the same subject matter as the contract. In all other cases the determination is in favor of the party who presents facts and circumstances to the court from which the intention of the parties may be inferred. In such cases the existence of only one fact or circumstance may be all that is needed to persuade the court that a certain contract provision should be deemed collateral and independent, thus conferring a separate cause of action upon the party claiming that no merger occurred.

JAMES A. CATALFIMO

TRUST APPORTIONMENT OF STOCK DISTRIBUTIONS: STOCK DIVIDEND V. STOCK SPLIT

One of the most perplexing problems in trust administration has been that of apportioning stock dividends between the life tenant and the remainderman. Throughout the United States there are three main rules which have governed the treatment of stock dividends: the Massachusetts rule, which allocates all stock dividends to the corpus or principal, distributable to the remainderman;[1] the Kentucky rule which allocates all stock dividends to the life tenant as income;[2] and the Pennsylvania rule which requires an apportionment of the dividend between the life tenant and the remainderman when allowing the life tenant to have the entire dividend would impair the original book value of the stock in the trust corpus.[3]

New York State first followed the Kentucky rule,[4] then adopted the apportionment theory as to extraordinary dividends,[5] and now by statute has adopted the Massachusetts rule where the trust came into existence after 1926.[6]

The case in New York that adopted the apportionment theory (Pennsylvania rule) as to extraordinary stock dividends was *Matter of Osborne*.[7] In that case the settlor on October 4, 1908, gave a number of shares of stock of the Singer Manufacturing Company to the trustee. At the time the trust was established the corporation had a capital of 30,000,000 dollars and an earned surplus account of 37,604,206 dollars. On June 17, 1910, the board of directors of the corporation declared a stock dividend of 30,000,000 dollars (a 100 percent dividend on the then outstanding stock) and at the same time capitalized 30,000,000 dollars of the earned surplus account. The issue before the court was whether or not the life tenant of the trust was entitled to the entire stock distribution received by the trustee. The court held that where there is an extraordinary stock dividend as in this case, the dividend must be apportioned in order to preserve the original value of the corpus and to give to the life tenant that income (earnings of the corporation during the life of the trust) which the settlor is presumed to have intended to go to the life tenant. Whether such an apportionment is necessary or not is determined by applying the "intact value" rule: if the book value [8] per share at the time of the creation of the trust is greater than the book value [9] per share after the extraordinary dividend, the difference between the two represents the impairment of the corpus of the trust, and apportionment is then required.

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[1] Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705 (1868).

[2] Hite v. Hite, 93 Ky. L. Rep. 257, 20 S.W. 778 (1892); now overruled in Kentucky by Bowles v. Stilley's Ex'r., 267 S.W.2d 707 (Ky. 1954).

[3] Earp's Appeal, 28 Pa. 368 (1857).

[4] Lowry v. Farmers' Loan & Trust Co., 172 N.Y. 137, 64 N.E. 796 (1902); McLouth v. Hunt, 154 N.Y. 179, 48 N.E. 548 (1897).

[5] Matter of Osborne, 209 N.Y. 450, 103 N.E. 723 (1913).

[6] N.Y. PERSONAL PROPERTY LAW § 17(a). This statute directs that when it is not otherwise provided in the trust indenture, stock dividends are to be distributed to corpus. It is applicable only to those trusts created after May 17, 1926.

[7] 209 N.Y. 450, 103 N.E. 723 (1913).

After the *Osborne* case settled the rule as to apportionment of extraordinary stock dividends in New York, the problem under modern corporate accounting practices became one of discerning what constitutes a stock dividend. It was stated in the *Osborne* case that a court must look to the actual nature and source of dividends for the purpose of determining their character as relating to the life tenant and the remainderman.[10]

Corporation accountants have set up many types of surplus accounts in an attempt to show accurately the financial affairs of a corporation. Whenever a corporation distributes stock accompanied by a capitalization of one or more surplus accounts it usually designates such a distribution a stock dividend. If the distribution is larger than the normal annual dividends given by the corporation, it is an extraordinary stock dividend, which under the *Osborne* case will go to the life beneficiary unless the settlor directed otherwise, or unless it tends to impair the trust corpus in which case it would be apportioned. Where the trust is one created after 1926, the rule is that all stock dividends will go to the trust corpus unless the settlor has directed otherwise in the trust indenture.[11]

The problem presented by the various surplus accounts and their capitalization in regard to the question of whether or not there has been a stock dividend was considered by the court of appeals in the recent case of *Matter of Payne*.[12] In that case the court held that a stock distribution is not to be considered as a stock dividend merely because it is based upon an account which contained the word *surplus* in its title. There had been a stock distribution based in part on a simultaneous capitalization of the account "capital surplus." The court examined the nature of this account and found that it did not represent normal business earnings of the corporation and therefore the life tenant could not be entitled to the stock distribution as a dividend in so far as it was supported by the charge to capital surplus. In effect, the court held that a stock dividend will result only to the extent that the normal business earnings retained in the corporation are capitalized in connection with a stock distribution which is contemporaneous in time. Any other basis for a stock distribution is a stock split and represents corpus where a trust is concerned.

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[8] *Id.* at 485, 103 N.E. at 823. "The intrinsic value [book value] of the trust investment is to be ascertained by dividing the capital and the surplus of the corporation existing at the time of the creation of the trust by the number of the shares then outstanding, which gives the value of each share, and that amount must be multiplied by the number of shares held in the trust."

[9] *Id.* at 485, 103 N.E. at 823. "The value of the investment represented by the original shares after the dividend has been made is ascertained by the same method" [as in note 8 *supra.*]

[10] *Id.* at 476, 103 N.E. at 730.

[11] See statute cited note 6 *supra.*

[12] 7 N.Y.2d 1, 163 N.E.2d 301, 194 N.Y.S.2d 465 (1959).

In considering what is to be income for the life tenant, the trustee under the *Osborne* case [13] must evaluate the nature and source of an extraordinary stock dividend. The *Osborne* rule requires the apportionment of a stock dividend on the theory that it represents a distribution of earnings actually retained by the corporation. It is apparent that a mere return of the corpus to the trustee is not income. In the trustee's consideration of what a stock distribution represents, he must determine whether there has been a stock dividend which must be apportioned or a stock split which can be allocated entirely to principal.

A stock split is not apportionable for it does not distribute the *earnings* (normal business earnings) of the corporation.[14] The basic difference between a stock split and a stock dividend as a matter of form is that a stock split usually results in no change in the capital account of the corporation, whereas a stock dividend must be accompanied by a transfer of surplus to the capital account on the books of the corporation. For trust purposes, however, a transfer from *any* surplus account to the capital account will not be sufficient to characterize a stock distribution as a stock dividend.[15] The court must look to the nature and source of the surplus account being capitalized, and unless it can be classified as earnings there is a stock split. It would seem that the most accurate description of a "stock dividend" for purposes of trust administration would be that a stock dividend is a capitalization of business profit, exclusive of natural capital increments [16] and paid-in-surplus,[17] accompanied by a stock distribution.

In considering what is income and what is capital to the trust, the court of appeals in the *Osborne* case [18] decided that the presumed intention of the settlor was to distribute all normal income to the life tenant and to allow the corpus to remain intact for the remainderman, except for natural losses of corpus.[19] Such a presumed intention would be thwarted if the beneficiary for life was not given that which represents earnings by the corporation when the corporation does distribute something which can be considered as representing those earnings. Because of the presumed intention that the settlor intended normal earnings of the corporation to go to the life beneficiary, it is essential that the trustee consider distributions of stock as to their source and the nature of the items in that source.

Furthermore, in considering the source and nature of stock distributions, the trustee should evaluate the differences between an ordinary shareholder and a trustee shareholder. For an ordinary shareholder, neither a stock split nor a stock dividend changes the intrinsic value of his holdings.[20] An ordinary stockholder has an interest, dependent upon the size of the capital and surplus of the corporation, in all the assets of the corporation as long as the corporation continues to hold such assets. When earned surplus is capitalized and stock is distributed the ordinary shareholder merely has more pieces of paper (share certificates) which he may either retain or sell.[21] When there is a stock distribution without the capitalization of any surplus accounts the ordinary shareholder again has only more pieces of paper representing the same proportionate interest in the capital and surplus of the corporation as he had prior to the distribution.

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[13] 209 N.Y. 450, 103 N.E. 723 (1913).

[14] See Matter of Fosdick, 4 N.Y.2d 646, 152 N.E.2d 228, 176 N.Y.S.2d 966 (1958).

[15] Matter of Payne, 7 N.Y.2d 1, 163 N.E.2d 301, 194 N.Y.S.2d 465 (1959).

[16] *Cf.* Pratt v. Ladd, 252 N.Y. 213, 170 N.E. 895 (1930).

[17] Matter of Payne, 7 N.Y.2d 1, 163 N.E.2d 301, 194 N.Y.S.2d 465 (1959).

[18] 209 N.Y. 450, 103 N.E. 723 (1913).

[19] See Equitable Trust Co. v. Prentice, 250 N.Y. 1, 164 N.E. 723 (1928).

[20] See BALLANTINE, CORPORATIONS 483 (rev. ed. 1946).

As a result of the *Osborne* case[22] shares of stock received by a trust from the capitalization of earned surplus are considered differently from those received by an ordinary shareholder.[23] Under the *Osborne* case the income beneficiary has a right to those earnings of the corporation accumulated during the life of the trust when such earnings are distributed by the corporation. The life tenant cannot, of course, demand that the corporation distribute its accumulated earnings, and for that reason his realization of income is dependent upon the declaration of dividends by the corporation.[24] A corporation rarely distributes all of its annual earnings in dividends. A portion of its annual earnings is generally credited to an earned surplus account, or some similar surplus account and retained in the business. The earnings are then available as a basis for dividends in poor income years and also are available for financing present and future business expansion.

When the earnings of the corporation are credited to an earned surplus account there is generally no counterpart in liquid assets. The money is normally used by the corporation for plant expansion or for current inventories. In general, the earned surplus account only shows to what extent the normal business income has been reinvested in the corporation. As such earnings are put back into the corporation, there arises the unusual situation of money being earned through the use of trust funds (the corpus value of the stock certificates) without such earnings being available as income of the trust. Except where the corporation has an unusual accumulation of cash or liquid assets, retained earnings can be easily distributed only by transferring either a portion or all of the earned surplus account to the capital account and issuing new shares in place of cash. To the extent that earnings are so retained in the corporation they increase the trust corpus and as a result benefit the remainderman, whereas the presumed intention of the settlor was that earnings should go to the life beneficiary.[25]

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[21] "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholder. Its property is not diminished, and their interests are not increased. . . . The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones." Gibbons v. Mahon, 136 U.S. 549, 559 (1890).

[22] 209 N.Y. 450, 103 N.E. 723 (1913).

[23] See Equitable Trust Co. v. Prentice, 250 N.Y. 1, 164 N.E. 723 (1928).

[24] "Where the trust fund consists of corporate stock the life tenant will ordinarily be limited to receiving only as much of the profits as the corporation sees fit to distribute in dividends. . . ." Matter of Schaefer, 178 App. Div. 117, 122, 165 N.Y. Supp. 19, 23 (1917).

[25] Equitable Trust Co. v. Prentice, 250 N.Y. 1, 8, 164 N.E. 723, 724 (1928).

In regard to the ownership rights of shareholders, a stock split and a stock dividend have the same result. Both a stock dividend and a stock split result in a dilution of the ownership rights as represented by outstanding shares prior to the new stock distribution.[26] This similarity of effect was discussed in *Equitable Trust Co. v. Prentice*.[27] In this case the court considered whether or not a direction by the settlor that the trustee could retain all stock distributions as corpus would be an unlawful accumulation of income. The court in reaching its decision found that in effect there is nothing distributed except pieces of paper, because the assets of the corporation are the same before and after a stock distribution. The only result of the corporation's act was to dilute the shares as they existed prior to the distribution whether it is a stock dividend or a stock split. The court concluded that there was no unlawful accumulation of income, for a stock dividend is not income in the sense of the statute forbidding accumulation of income by a trust.

Since a stock dividend resembles a stock split in causing a dilution of ownership rights, an allocation of a stock dividend to the income beneficiary does appear to diminish the rights incidental to the corpus of the trust. The corpus no longer represents so great an amount of ownership rights as were represented by the corpus investment prior to the stock dividend or split. In considering the effect of diluting ownership rights, it is necessary to keep in mind that the presumed intention of the settlor was that the income of the trust was intended for the life tenant, and that accumulated earnings of the corporation represent a potential income to the trust.

The ownership rights in general represented by a share of stock are the right to vote in corporate affairs, the right to share in distributions of earnings or surplus of the corporation, and the right to share in the assets of the corporation on dissolution of the corporation.[28] In regard to the dilution of voting rights, it is doubtful that the donor was especially interested in voting rights as between the remainderman and the life beneficiary. It is particularly doubtful that he was interested in voting rights in the situations where the stock was purchased by the trustee after the formation of the trust. It is far more likely that he intended to dispose of a sum of money or assets in relation to the needs and positions of the objects of his bounty.

The resulting dilution of the right to share in the assets of the corporation upon dissolution of the corporation appears to result in the most serious loss to the remainderman. Prior to the allocation of stock to the life tenant, the corpus had an interest in the assets of the corporation which would be left after payment of creditors. The extent of this interest depends upon the percentage of outstanding shares which the corpus holds. By giving a portion of a new stock distribution to the life tenant, the percentage of stock held in the trust is lessened as to the total outstanding stock of the corporation. This lessens the amount that the trust would realize on its stock should the corporation dissolve immediately after the stock was allocated to the life tenant. In this situation a portion of all the assets held by the corporation was the retained earnings in the business. As discussed earlier, however, apart from liquidation this retention of earnings results in the remainderman being benefited at the expense of the life tenant, since there is a user of the trust corpus in making an income which cannot be obtained by the life tenant without some subsequent distribution.

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[26] 3 SCOTT, TRUSTS § 236.3 (2d ed. 1956).

[27] 250 N.Y. 1, 12, 164 N.E. 723, 725 (1928).

[28] See generally 7 WHITE, NEW YORK CORPORATIONS ¶ 7.04 (12th ed. 1953).

When the source of these funds is considered, it appears that the remainderman is not actually losing anything to which he was entitled in the normal trust relationship. He is only losing a claim to income earned by the corporation which, if it had been earned by the trustee, would have unquestionably belonged to the life tenant. The fact that the one realizing this income was a corporation should not change the normal relationship of the remainderman and the tenant for life. In so far as the assets represent accumulated earnings which have been capitalized by the corporation, the remainderman has lost nothing to which he is normally entitled by virtue of being a remainderman.

In so far as the right to share in the future earnings of the corporation has been diluted by a stock dividend there can be no complaint on the part of the remainderman, for the right to such earnings is basically in the life tenant. As to ordinary dividends declared by the corporation, the life beneficiary would receive these regardless of whether or not the stock was apportioned or given entirely to the life tenant. As to accumulated earnings of the corporation, the presumed intention of the settlor is that the income from trust funds is to be distributed to the life tenant and accordingly the primary rights to such earnings are always in the life tenant. It is only the form of the corporation as user of trust funds that prevents the life tenant from being able to claim all normal business earnings of the corporation as soon as earned. To allow the life tenant a right to share in future declarations of accumulated earnings directly as a shareholder rather than through the trust does not injure the remainderman.

One of the most important criteria, when considering who should receive a distribution of shares when accompanied by a capitalization of earned surplus, is that the life tenant would have been allocated a share of the distribution had it been in cash or assets of the corporation instead of new shares of stock, subject only to the intact value rule.[29] The intact value rule requires that when an extraordinary distribution of earnings is in cash or assets of the corporation, the life tenant is entitled to them except as they tend to impair the book value of the stock as of the time the trust was founded or the trustee purchased the stock.[30] Since the life tenant is entitled to the cash distribution of income earned during the life of the trust, it is difficult to reason that because it was capitalized and the value thereof was distributed in share certificates that there should be a loss of such earnings to the life tenant. If the result of dilution of ownership rights is considered, it appears that allowing a stock distribution of earnings as a stock dividend does not result in a hardship on the remainderman.

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[29] Matter of Osborne, 209 N.Y. 450, 103 N.E. 723 (1913).

[30] *Ibid.*

The intact value rule as formulated in the *Osborne* case[31] protects the remainderman from an impairment of the original book value of the stock in the trust corpus. The theory that the intent of the settlor was to give the earnings of the corporation to the life beneficiary has also been restricted so that it does not include natural capital increments of the corporation that are unrelated to its ordinary business affairs.[32]

A case that refused to follow the presumed intention of the settlor to its complete extent is *Matter of Strong*.[33] The facts of the case were that at various times since the inception of the trust the corporation had capitalized certain amounts of earned surplus without any accompanying stock distributions. As the earnings were capitalized, the corporation increased the stated value of the outstanding no par shares to equal the amount of earnings capitalized. Subsequently, in 1947, the corporation split the stock on a five-for-one basis without capitalizing any earned surplus.

The life beneficiaries in the *Strong* case contended that this stock dividend finally divorced the earned surplus from the corporation and to the extent earned surplus had been previously capitalized, the stock distribution should have been apportioned. The court considered prior cases dealing with stock distributions and found that where the court had characterized them as stock dividends there had always been a transfer from earned surplus simultaneously with the stock distribution. In this case the capitalization of earned surplus had not been close in time to the stock distribution. The court paid no attention to the presumed intention of the settlor regarding earnings of the corporation but decided that here the intentions and actions of the directors of the corporation were controlling. Because of the acts of the directors the court held that this stock distribution was a stock split and not an apportionable stock dividend. The particular acts that kept the court from recognizing the stock distribution as a distribution of accumulated earnings by the corporation were the various capitalizations of earned surplus and the raising of the stated value of the no-par stock. By its holding the court simply gave preference to the form of the action of the corporation instead of allowing the source of the stock distribution to control.

A case that followed the presumed intention of the settlor and considered the nature and source of the corporate act is *Matter of Schaefer*.[34] This case did not deal with a stock distribution, but rather with a sale of stock held in trust. The stock was sold by the trustee to the corporation itself. During the time the stock had been held by the trust, the corporation had each year retained a portion of its net earnings as a surplus. Prior to the purchase of stock from the trustees the earnings so retained had never been capitalized by the corporation. The life beneficiaries contended that the gain in excess of the value of the shares at the inception of the trust should be apportioned, in so far as such gain represented the earnings retained by the corporation during the life of the trust. The court held that where the corporation repurchases its own stock it has effected a partial liquidation and since a life tenant has a right to accumulated profits when a corporation is completely liquidated[35] he has the same rights in a partial liquidation. The court in reaching its decision stated:

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[31] 209 N.Y. 450, 103 N.E. 723 (1913).

[32] *Cf.* Matter of Hagen, 262 N.Y. 301, 305, 186 N.E. 792, 793 (1933).

[33] 198 Misc. 7, 96 N.Y.S.2d 75 (Surr. Ct.), *aff'd*, 277 App. Div. 1157, 101 N.Y.S.2d 1021 (1950).

[34] 178 App. Div. 117, 165 N.Y. Supp. 19, *aff'd*, 222 N.Y. 533, 118 N.E. 1076 (1917).

> Where the trust fund consists of corporate stock the life tenant will ordinarily be limited to receiving only so much of the profits as the corporation sees fit to distribute in dividends, but when the accumulated profits come into the hands of the trustee in any form or manner the life tenant is entitled to receive them.[36]

Such a broad statement of the principle that a life tenant is entitled to earnings of the corporation accumulated during the life of the trust would seem to include the distribution of stock at anytime after earned surplus has been capitalized. The facts of the *Schaefer* case, however, did not present such a situation.[37] A case subsequent to the *Schaefer* case in dealing with the proceeds from the sale of stock rights by a trustee, considered that apportionment was to be had only

> [I]n a case where the surplus of the corporation or some part thereof is distributed by dividends in cash or stock or where in liquidation of the company's business its assets are sold and the proceeds distributed among the stockholders, *or as was held where the corporation purchases the stock from the trustees, thereby in effect causing a partial liquidation of the assets.*[38]

Such a statement of the rule in the *Schaefer* case indicates that the court considered the rule as only applying to its particular facts.

The traditional definition of a stock dividend was reaffirmed in the recent case of *Matter of Fosdick.*[39] This case involved the cancellation of old stock and reissuance of three shares of new stock for every old share a holder held at the time of reissuance. This was accompanied by a transfer of earned surplus to the capital account equal to the par value of the new stock distribution. The question before the court was whether such corporate action represented a stock split which would be distributed to the corpus, or a stock dividend which by the terms of the trust would go to the executor of the donor. The court held that this was a stock dividend and not a stock split. The court stated that "it is the almost exceptionless holding of the later cases on this subject that the distribution of additional stock to shareholders in conjunction with the capitalization of earned surplus constitutes a stock dividend." [40] The court also stated that its inquiry was to see "that the settlor's intent as manifested in his language be effectuated." [41] In this case the settlor had expressly directed that all stock dividends be distributed to the donor or his executor.[42] It appears from the decision of this case that the court of appeals is going to give the fullest consideration to the intention of the settlor where he expressed an intention that stock dividends are to go elsewhere than the corpus.

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[35] Matter of Rogers, 161 N.Y. 108, 55 N.E. 393 (1899).

[36] Matter of Schaefer, 178 App. Div. 117, 165 N.Y. Supp. 19, *aff'd,* 222 N.Y. 533, 118 N.E. 1076 (1917).

[37] But see Matter of Strong, 198 Misc. 7, 96 N.Y.S.2d 75 (Surr. Ct.), *aff'd,* 222 N.Y. 533, 118 N.E. 1076 (1917).

[38] Baker v. Thompson, 181 App. Div. 469, 472, 168 N.Y. Supp. 871, 872–73, *aff'd,* 224 N.Y. 592, 120 N.E. 858 (1918). (Emphasis added.)

[39] 4 N.Y.2d 646, 152 N.E.2d 228, 176 N.Y.S.2d 966 (1958).

If the court is going to give complete effect to the intention of the settlor where he has expressed an intent, it should do the same in a situation where the settlor has not expressed his intent but the law implies an intent to give earned surplus to the life tenant when distributed. The only limitation on giving effect to the actual or implied intention is that the corpus cannot be impaired by such a distribution. It has been suggested that the method of determining whether a given share distribution is a stock dividend should be to determine the corporation's basic motive in issuing the new shares.[43] Such a test, however, would fail to consider the relationship of life tenants and remaindermen in trusts.

The normal relationship of life tenant and remainderman requires that earnings of the trust go to the life tenant, and the fund which originally formed the *res* of the trust goes to the remainderman. The presumed intention of the settlor, under the *Osborne* case,[44] was that earnings of the corporation would go to the life tenant when distributed. If the court looks only to the intention of the corporation in regard to the stock distribution it will fail to answer the question as to what the testator intended to do with retained corporate earnings.

Matter of Fosdick,[45] in carrying out the intent of the settlor, shows that the courts are still willing to look at the nature and source of a stock distribution in determining whether it is to be characterized as a stock dividend or a stock split. This case, however, presented a situation which has consistently been held to be a stock dividend as a matter of form; so it is not clear that the court of appeals would be willing to give effect to the presumed intent of the settlor in such cases as *Matter of Strong*.[46] As the cases stand today it is clear that the court will find a stock dividend when the corporation capitalizes earned surplus and simultaneously, or practically simultaneously, distributes stock based on such a capitalization.[47] It is equally clear that the court in so doing is merely looking to the form of the transaction. In view of the fact that the *Osborne* case [48] presumed that the intention of the settlor was to give the earnings of the corporation to the life tenant when they are distributed, it would seem that the court should cease looking at the form of the corporate action and should give effect to the presumed intention of the settlor, whenever it is reasonably certain that a realized gain in the corpus is the result of earnings of the corporation accumulated during the life of the trust. The requirement of apportionment laid down in the *Osborne* case is sufficient to leave the parties as they would have been had there been cash instead of stock in the trust corpus.

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[40] *Id.* at 653, 152 N.E.2d at 232, 176 N.Y.S.2d at 971.

[41] *Id.* at 655, 152 N.E.2d at 233, 176 N.Y.S.2d at 973.

[42] *Id.* at 650, 152 N.E.2d at 230, 176 N.Y.S.2d at 968.

[43] *Id.* at 658, 152 N.E.2d at 235, 176 N.Y.S.2d at 975.

[44] 209 N.Y. 450, 103 N.E. 723 (1913).

[45] 4 N.Y.2d 646, 152 N.E.2d 228, 176 N.Y.S.2d 966 (1958).

[46] 198 Misc. 7, 96 N.Y.S.2d 75 (Surr. Ct.), *aff'd*, 277 App. Div. 1157, 101 N.Y.S.2d 1021 (1950).

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[47] Matter of Fosdick, 4 N.Y.2d 646, 152 N.E.2d 288, 176 N.Y.S.2d 966 (1958). Matter of Payne, 7 N.Y.2d 1, 163 N.E.2d 301, 194 N.Y.S.2d 465 (1959).

[48] 209 N.Y. 450, 103 N.E. 723 (1913).

RECENT DECISIONS

ARBITRATION—SPECIFIC PERFORMANCE OF CONSTRUCTION CONTRACT—*Grayson-Robinson Stores, Inc. v. Iris Constr. Corp.*, (New York, 1960)

The court of appeals recently held, three judges dissenting, that an arbitration award made pursuant to express powers given to the arbitrators and directing specific performance of a contract for the construction of a building to be rented for use as a retail department store was properly confirmed, and that the enforcement of the award would not be contrary to public policy. *Grayson-Robinson Stores, Inc. v. Iris Constr. Corp.*, 8 N.Y.2d 133, 168 N.E.2d 377, 202 N.Y.S.2d 303 (1960).

The appellant construction company entered into a written agreement with the respondent, Grayson-Robinson Stores, Inc., whereby the construction company agreed to erect on its own land a building estimated to cost $5,000,000 to be rented to the respondent for use as a retail department store for a twenty-five year term. The agreement called for arbitration of all disputes and incorporated the rules of the American Arbitration Association which empower the arbitrator in his award to grant any just or equitable relief "including . . . specific performance." American Arbitration Association, Commercial Arbitration Rules VIII, § 42 (1952).

The final specifications were approved by both parties and excavation substantially completed when the construction company notified respondent that it could not continue work because of difficulties in procuring mortgage money. The agreement did not relieve the construction company of its obligation in the event it should find borrowing difficult. The building was never completed. The case was submitted for arbitration and the arbitrators ordered the appellant to proceed with the improvements of the premises in accordance with the agreement.

The court was met with the dilemma of whether to thrust upon the courts the supervision of a very complex building contract, or to vacate a completely valid arbitration award made in accordance with the express authority given by the parties to the arbitrators and meeting all the statutory requirements for confirmation. See N.Y. Civ. Prac. Act §§ 1461, 1462, 1462-a.

In deciding to confirm the award, the court evaded any direct holding as to the power of the court to vacate the award, in view of the narrowly limited statutory grounds for vacation or modification of arbitration awards. See N.Y. Civ. Prac. Act §§ 1461, 1462, 1462-a. The court held that even making the "very large assumption" that such discretion did exist, the lower courts' exercise of discretion in refusing to vacate the award was justified on the facts. The majority thought it would be "quite remarkable" if the courts would frustrate the whole arbitration process by refusing to confirm the award. The court further stated that the "speculation" that confirmation would involve the court in supervision of a complex construction project was no deterrent to confirmation, especially where the parties provided for that remedy in their agreement.

New York has repeatedly followed the equitable principle that contracts which require the performance of varied and continuous acts will not, as a general rule, be specifically enforced by courts of equity because of the serious possibility that the execution of the decree would involve the court in the supervision of numerous details. *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N.Y. 60, 51 N.E. 408 (1898); *Beck v. Allison*, 56 N.Y. 366, 15 Am. Rep. 430 (1874); *Berne v. Payson*, 155 N.Y.S.2d 696 (Sup. Ct. 1956); *Price v. Herman*, 81 N.Y.S.2d 361 (Sup. Ct. 1948); *aff'd*, 275 App. Div. 675, 87 N.Y.S.2d 221 (1949); see 4 Pomeroy, Equity Jurisprudence § 1402 (5th ed. 1941). If specific performance of such a contract were decreed, and the successful litigant should later commence a proceeding to compel the adverse party to carry out the equity decree, the court would be compelled to determine specifically what should be done, and when and how, and then enforce performance by a body execution. *Beck v. Allison*, 56 N.Y. 366, 15 Am. Rep. 430 (1874).

The minority based its dissent upon the difficulty of enforcement problems, and noted that these problems are not diminished by the fact that the court may be required to undertake supervision of a complex building contract as the result of arbitration. Section 1466 of the New York Civil Practice Act provides that a judgment entered following confirmation of an arbitration award has ". . . the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." Thus, as was pointed out by the dissent, it is the court, and not the arbitrators, that has the responsibility of enforcing a judgment confirming an arbitration award. When the award confirmed by the court directs specific performance of a building contract as in the principal case, the court may be met with difficulties similar to those envisioned in the *Beck* case.

As noted by the majority in the principal case, it is discretion that underlies the reluctance of equity courts to decree specific performance of such contracts. It is not public policy or lack of jurisdiction. *Kearns-Gorsuck Bottle Co. v. Hartford-Fairmont Co.*, 1 F.2d 318 (S.D. N.Y. 1921); *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N.Y. 60, 51 N.E. 408 (1898). The court has, in the past, departed from the rule in the exercise of its discretion. Contracts relating to the management and control of public transportation have been specifically enforced, though the contracts involved the performance of varied and continuous acts. *Prospect Park & Coney Island Ry. v. Coney Island & Brooklyn R.R.*, 144 N.Y. 152, 39 N.E. 17 (1894); *Lawrence v. Saratoga Ry.*, 36 Hun 467 (N.Y. Sup. Ct. 1885). The determinations of these cases were founded upon the needs of the public rather than those of a private litigant.

The New York courts have given a strict construction to article 84 of the New York Civil Practice Act which enumerates the grounds for vacation of an arbitration award, by refusing to imply a provision that the act takes away the courts' equitable jurisdiction on motions to confirm arbitration awards. *Lipschutz v. Gutwirth*, 304 N.Y. 58, 106 N.E.2d 8 (1952); *Western Union Tel. Co. v. Selly*, 295 N.Y. 395, 68 N.E.2d 183 (1946); *Feuer Transp. Inc. v. Local 445, Int'l Bhd. of Teamsters*, 295 N.Y. 87, 65 N.E.2d 178 (1946). Judge Conway stated in the *Lipschutz* case that the supreme court acts as a court of equity in arbitration matters and applies equitable principles and enjoys a certain latitude of discretion. 304 N.Y. at 63, 106 N.E.2d at 11. In the principal case, the court in the exercise of this equitable jurisdiction departed from the rule concerning specific performance of complex construction contracts in furtherance of its liberal policy of promoting arbitration by upholding arbitration awards.

The principal case is the latest of recent New York decisions where this liberal policy of the court has resulted in the confirmation of arbitration awards granting relief beyond that which would have been granted had the case originated before the courts. *Staklinski v. Pyramid Elec. Co.*, 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959); *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958).

In the *Ruppert* case, the arbitrators had issued an injunction in a labor dispute without making the findings which would have been required by section 876-a of the New York Civil Practice Act before a court could lawfully issue a similar injunction. Nonetheless, the court of appeals confirmed the arbitrators' award and enforced the injunction.

In the *Staklinski* case, the arbitrators directed that petitioner be reinstated as production manager of respondent corporation under a long-term contract of employment. The argument that confirmation of the award was improper since a court of equity could not have ordered specific performance in the situation was held by the court to be irrelevant because the parties had made specific provision for such an award by their arbitration agreement. The court further stated that whether a court of equity could issue a specific performance decree in a case like this was "beside the point."

The policy of the court is based on the principle that since the parties chose their own judges and agreed to abide by their decision, they should be bound by their agreement and compelled to perform the award. *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958); *Spectrum Fabrics Corp. v. Main St. Fashions, Inc.*, 285 App. Div. 710, 139 N.Y.S.2d 612 (1955), *aff'd*, 309 N.Y. 709, 128 N.E.2d 416 (1955); *Matter of Wilkins*, 169 N.Y. 494, 62 N.E. 575 (1902).

There is also a strong equitable reason supporting the court's final determination on the facts of the instant case. Where the work is to be done by a defendant upon land in the defendant's possession, as in the principal case, the plaintiff may not be able to establish his damage, or secure execution of the contract by completing the work himself and therefore would have no adequate remedy at law. *Zygmunt v. Avenue*

Realty Co., 108 N.J. Eq. 462, 155 Atl. 544 (1931); see *Wolverhampton Corp. v. Emmons*, (1901) 1 K.B. 515.

A further basis for the court's decision lies in the fact that the nature of the work to be done was clearly defined in the final plans and specifications which were approved by both parties. Other jurisdictions have specifically enforced contracts to build or repair and contracts calling for performance of numerous acts over an extended period of time if there existed an objective standard by which performance might be defined capable of determination and application by experts. *Jones v. Parker*, 163 Mass. 564, 40 N.E. 1044 (1895); *Brummel v. Clifton Realty Co.*, 146 Md. 56, 125 Atl. 905 (1924); *Zygmunt v. Avenue Realty Co.*, 108 N.J. Eq. 462, 155 Atl. 544 (1931).

The courts' traditional reluctance to decree specific performance of contracts requiring varied and continuous acts may be today in certain cases unrealistic. Often, specific performance of the contract is the only just and adequate relief for the business man. By incorporating into their agreement an arbitration clause which empowers the arbitrator in his award to grant specific performance, the parties may bypass the traditional judicial difficulties which are met when specific performance of such contracts is desired. The arbitrator need not consider specific performance as a remedy which can be granted only when damages would be inadequate or only when the contract calls for relatively few simple acts to be performed. Unfettered by the usual judicial reluctance to grant such relief, he may consider the remedy as the one most likely to do justice between the parties. Commercial arbitration, it seems, opens the door to a large field where specific performance, heretofore denied, may be decreed.

S. M. K.

CONSTITUTIONAL LAW—STATUTORY PROHIBITION ON THE PRESCRIPTION OF CONTRACEPTIVES—VIOLATION OF DUE PROCESS VERSUS VALID EXERCISE OF POLICE POWER—*Buxton v. Ullman,* (Conn. 1959)

Sections 53–32 and 54–196 of the General Statutes of Connecticut (1958), which declare it unlawful for a physician to advise or counsel his patients as to the use of contraceptive devices, have been held to be constitutional and not violative of the due process clause of the fourteenth amendment of the United States Constitution. *Buxton v. Ullman,* 147 Conn. 48, 156 A.2d 508 (1959), *prob. juris. noted,* 362 U.S. 987 (1960).

The plaintiff, a licensed physician and experienced obstetrician and gynecologist, challenged the statute as an unconstitutional invasion of his right to practice medicine free from unreasonable restraints and prohibitions. Several patients of the plaintiff, who had been advised that any future pregnancies might be fatal, joined as parties plaintiff alleging that they could not lead normal married lives unless they received counseling and advice about the use of contraceptives. The plaintiffs contended that the statute was an abuse of the state's police power and a denial of due process as guaranteed by the fourteenth amendment. The defendant, the state attorney general, interposed a demurrer upon the grounds that the issues presented had been previously determined by the court. The demurrer was sustained.

The statute, which has as its primary objective the control of contraceptives, raises constitutional questions that are neither novel nor without precedent. "An Act to Amend an Act Concerning Offenses against Decency, Morality, and Humanity," originally enacted as Chapter 78 of the Public Acts of 1879, represented the initial attempt of the Connecticut Legislature to set out definitively what has become the present law of that state. This law, as presently embodied in the General Statutes of Connecticut (1958), is in two parts: section 53–32 declares that the use of any drug or instrument to prevent conception is unlawful; section 54–196 states that the counseling or advising of another to commit the offense is also illegal.

The courts of Connecticut have continually upheld the statute as an authorized exercise of the state's police power and not violative of the constitutional guarantee of due process. In *State v. Nelson,* 126 Conn. 412, 11 A.2d 856 (1940) two doctors and a nurse were indicted for advising and counseling patients as to the use of contraceptives. The court, in construing the statute, refused to read into it an implied exception in favor of the physician. Such an exception, permitting physicians to advise and counsel their patients as to the advisability of contraceptives where the general health and welfare of the patients involved warranted it, could not, the court said, be implied in the light of the expressed will of the legislature. In *Tileston v. Ullman,* 129 Conn. 84, 26 A.2d 582 (1942), the plaintiff physician, in a similar attempt to have the statute stricken on constitutional grounds, raised the question of whether the statute was applicable where a human life would be jeopardized if his patient became pregnant. The court in meeting plaintiff's constitutional argument, again upheld the statute as a valid exercise of the state's police power and declared sexual abstinence to be a reasonable answer to the patient's problem.

Buxton v. Ullman, supra, presents a somewhat different issue. The plaintiff physician is not asserting the rights of his patients, as petitioner did in the *Tileston* case, but is asserting his own rights in an attempt to exclude himself from the holding against the physician in *Tileston.* The court in *Buxton,* in considering the merit of plaintiff's position, held that the legislature had clearly manifested its intentions; that no implied exception in favor of the physician could be read into the statute without usurping the power of the legislature; and that the statute, as it sought to provide for the public health and morals, was a valid exercise of the state's police power.

The police power of a state is its power to regulate and control the activities of all the people within its jurisdiction. *House v. Mayes,* 219 U.S. 270, 282 (1911); *Jacobson v. Massachusetts,* 197 U.S. 11, 25

(1905). The power is designed to afford maximum protection for public health, safety, and morals, with a minimum encroachment on individual rights. *Nebbia v. New York,* 291 U.S. 502, 526 (1934); *Lochner v. New York,* 198 U.S. 45, 57 (1905). However, any unwarranted infringement upon these rights is an abuse of the power, and the law or statute under which enforcement is sought is unconstitutional. *McLean v. Arkansas,* 211 U.S. 539, 552 (1909).

If the decision is reviewed by the United States Supreme Court, the fact that the statute, as interpreted by the Connecticut judiciary, has been repeatedly held valid, may be a persuasive consideration. *Ward & Gow v. Krinsky,* 259 U.S. 503, 510 (1922); *Southwestern Tel. Co. v. Danahar,* 238 U.S. 482, 489 (1915). However, the plaintiff's position, that the statute abridges his right to practice medicine free from any unreasonable restraints or prohibitions, is one that raises serious due process considerations. Plaintiff's contention that the restriction imposed by the Connecticut statute is such a restraint is novel, to the extent that the question has never been squarely passed upon by the United States Supreme Court. There are, however, cases concerned with comparable restrictions placed upon physicians, which are pertinent to the instant discussion. In *United States v. Freund,* 290 Fed. 411 (D.C. Mont. 1923), the court upheld defendant's contention that the National Prohibition Act infringed upon his right to practice medicine. A provision of this statute which sought to limit the number of prescriptions that a physician could issue for intoxicating liquor used as a curative, was held unconstitutional as a denial of due process to the physician. However, in *Lambert v. Yellowley,* 272 U.S. 581 (1926), where the same statute was before the court, it was held that the restriction was "appropriate legislation," on the ground that the right to practice medicine was subordinate to the state's police power and to the power of Congress in enforcing the act in question.

However, the constitutionality of the Connecticut statute, as interpreted by the Supreme Court of Connecticut, cannot be supported by an argument that it represents legislation that is common throughout the United States. See 45 HARV. L. REV. 723 (1932); 6 U. CHI. L. REV. 260 (1939). The first congressional legislation restricting the free flow of contraceptives was the Comstock Act, Rev. Stat. § 3893 (1875), 18 U.S.C. § 1461 (1958), which provided for the suppression of obscene literature and articles for immoral use. The act, as originally introduced, permitted an exception in favor of professional medical use. When finally enacted, however, this clause was omitted, and the federal courts, in construing subsequent revisions of the Comstock Act, read into it such a proviso. Thus, in *Youngs Rubber Corp. v. C. I. Lee & Co.,* 45 F.2d 103 (2d Cir. 1930), it was held that a manufacturer of contraceptives could maintain a trade-mark infringement action when it was not proved that he intended that the contraceptives be used for illegal purposes. An analogous decision followed *Youngs* in the now famous *Hannah Stone* case, *United States v. One Package,* 86 F.2d 737 (2d Cir. 1936), where the court, in passing upon the legality of importing contraceptives under the Tariff Act §

305(a), 46 Stat. 688, 19 U.S.C. § 1305 (1930), similarly read into that act the exception in favor of physicians.

In New York State the applicable statutes are embodied in sections 1142 and 1145 of the Penal Law. The former section forbids the sale of contraceptives for the prevention of conception and also prohibits the providing of information as to where the same can be obtained. The latter section qualifies the former to the extent that it permits physicians to prescribe contraceptives where the health and safety of the patient is involved. The constitutionality of the New York statute, with the pertinent exception provided for in section 1145, has been affirmed as a necessary and proper exercise of the state's police power in the protection of the public health, safety, and morals. *People v. Sanger,* 179 App. Div. 939, 166 N.Y. Supp. 1107, *aff'd,* 222 N.Y. 192, 118 N.E. 637 (1918); *People v. Byrne,* 99 Misc. 1, 163 N.Y. Supp. 682 (Sup. Ct. 1917). It is to be noted that it is the exception in the New York law, which permits the physician to advise and counsel his patients as to the use of contraceptives, that the plaintiff in the *Buxton* case is attempting to have established.

It appears that plaintiff's position is somewhat weakened by the consistent position taken by the courts of Connecticut, as well as by the United States Supreme Court decision in the *Lambert* case, *supra.* However, should the United States Supreme Court uphold plaintiff's position, a reversal of the *Lambert* decision is not a necessary adjunct thereto, as a decision that the Connecticut statute is an unreasonable exercise of the state's police power would not be a decision rejecting the broader principle that the rights of physicians are subject to state regulation.

W. A. S.

CONTRACTS—AGENT PERFORMS CONTRACT BY ILLEGAL ACT—DENIED RECOVERY OF HIS COMMISSIONS—*McConnell v. Commonwealth Pictures Corp.,* (New York, 1960)

In *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 166 N.E.2d 494, 199 N.Y.S.2d 483 (1960), it was held, two judges dissenting, that an agent may not recover commissions from his principal when, in performance of his duties under the contract, he bribed an agent of a third party.

McConnell, the plaintiff, was the agent of the defendant to negotiate for the distribution rights of motion pictures. If the plantiff was successful in the negotiation, the defendant was to pay him $10,000 and a percentage of the gross receipts from the distribution rights. Without defendant's knowledge, plaintiff arranged to pay $10,000 to an agent of United World Films, hereinafter called United, with whom he was negotiating, to have him use his influence to aid in securing the contract with United. Upon completion of the contract between the defendant and United, defendant paid plaintiff $10,000 pursuant to its contract with plaintiff, which sum plaintiff paid to United's agent as agreed.

Plaintiff sued for an accounting in which he demanded the percentage of the gross receipts from the distribution rights alleged to be due him under his contract with the defendant. Defendant contended that bribery of United's agent by the plaintiff precluded recovery. Special term held that, as no part of the contract was illegal, a recovery might be had, although the plaintiff in performing the contract committed an illegal act. *McConnell v. Commonwealth Pictures Corp.*, 1 Misc. 2d 751, 147 N.Y.S.2d 77 (Sup. Ct. 1955). The appellate division affirmed without opinion, one justice dissenting. *McConnell v. Commonwealth Pictures Corp.*, 7 App. Div. 2d 905, 182 N.Y.S.2d 631 (1959).

The court of appeals, reversing, upheld the defendant's defense that an agent may not recover commissions from his principal when in the performance of his contract he bribed an agent of a third party. The majority based its decision on a principle long recognized in New York, that a party to an illegal contract cannot ask a court to aid him in the accomplishment of his unlawful object. See *Stone v. Freeman*, 298 N.Y. 268, 82 N.E.2d 571 (1948); *Reiner v. North American Newspaper Alliance*, 259 N.Y. 250, 181 N.E. 561 (1932); *Morgan Munitions Supply Co. v. Studebaker*, 226 N.Y. 94, 123 N.E. 146 (1919); *Gray v. Hook*, 4 N.Y. 449 (1851); *Sirkin v. Fourteenth St. Store*, 124 App. Div. 384, 108 N.Y. Supp. 830 (1908). The principle of public policy, that a person will not be permitted to profit by his fraud or acquire property through his criminal acts, stated in *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), was applied. In *Riggs*, a beneficiary under a will who murdered the testator in order to prevent a revocation was denied recovery under the will.

In the principal case, the majority said that the principle in *Riggs* must either be followed or repudiated. Plaintiff's bribe was a violation of section 439(1) of the New York Penal Law, which makes it a misdemeanor to bribe an employee in order to influence his employer. While the plaintiff had not been convicted of the crime of bribery, the majority said it appeared that the act alleged in the defense would constitute bribery under section 439(1) of the Penal Law. Furthermore, recovery of the commissions would have been denied plaintiff under his contract with defendant by common law principles. See *Reiner v. North American Newspaper Alliance*, 259 N.Y. 250, 181 N.E. 561 (1932).

The dissent by Judge Froessel followed the reasoning in *Dunham v. Hastings Pavement Co.*, 56 App. Div. 244, 67 N.Y. Supp. 632 (1900), rather than that of the *Riggs* case. In the *Dunham* case, an action was brought by an agent to recover compensation for services under a contract requiring him to use reasonable, honest and lawful efforts to obtain municipal bids for the laying of pavement. It was held to be a question for the jury whether the contract contemplated transactions of such a nature as to make the contract illegal as against public policy. The test for recovery of commissions was said in the *Dunham* case to be whether the parties contemplated the performance of illegal acts under the contract, not whether the agent had in fact committed one or more illegal acts during performance. Judge Froessel's dissent in the principal case asserted that there was no evidence to show that defendant had knowledge of or contemplated the improper action of the plaintiff in performing their contract. The contract in *Dunham* had been upheld in the absence of a showing that the contract in that case contemplated the doing of illegal acts by the plaintiff, or that the defendant knew in advance that the plaintiff would do such acts in the performance of the contract. Judge Froessel thought that for the same reason, the plaintiff in the principal case should not be denied relief.

In denying recovery of commissions based on a valid contract on the ground that the manner of performance of the contract was unlawful, the majority extends the principles of prior cases which denied recovery because the acts constituting the subject matter of the contracts were illegal, invalidating the agreements at their inception. In *Stone v. Freeman*, 298 N.Y. 268, 82 N.E.2d 571 (1948), a vendor was denied recovery of commissions paid under a contract with his broker. Under the contract, the broker was directed by the vendor to split these commissions with an employee or representative of the vendee to influence the sale between the vendor and vendee. The broker made the sale, but did not split the commissions. It was held that the vendor could not recover these commissions as his contract with the broker had an illegal purpose.

The court denied recovery in *Reiner v. North American Newspaper Alliance*, 259 N.Y. 250, 181 N.E. 561 (1932), in which the plaintiff contracted to send news concerning the flight of the Graf Zeppelin exclusively to the defendant. Plaintiff had made a prior contract with the owners of the Zeppelin under which he had agreed, as part of the consideration for his passage on the Zeppelin, not to send any news of the flight. When defendant refused to pay plaintiff for sending news of the flight, plaintiff brought an action for the payment promised under the contract. The court in *Reiner* declined to enforce the contract at the instance of a plaintiff who had known when he entered into the contract that in performing under it he would necessarily breach a prior contract to which he was a party.

The majority in *McConnell* found *Sirkin v. Fourteenth St. Store*, 124 App. Div. 384, 108 N.Y. Supp. 830 (1908), to be analogous to the case at bar and relied on it as a precedent. In *Sirkin*, suit was brought to recover money for goods sold to the defendant by the plaintiff. Plaintiff had bribed the defendant's purchasing agent to influence the making of the contract, and for this reason recovery was denied. *Sirkin* was similar to *McConnell* in that a bribe was given by plaintiff to promote the making of a contract of purchase. It differs, however, in that the person bribed was the agent of an actual party to the contract sued upon, whereas in *McConnell* the person bribed was the agent of a third person not a party to the contract in suit. The connection between the crime and the contract was therefore closer in *Sirkin* than in the principal case. However, in each case the bribe was an inducing cause of the contract. An illegal act, a crime under the Penal Law, made both contracts possible.

The majority in *McConnell* found the connection between the illegal act and the valid contract to be sufficiently direct to deny recovery. The court makes it clear that a direct connection between the unlawful transaction and the contract sued on is necessary to invalidate the contract and that every small illegality in the performance of a contract will not make it invalid. On this point the court cited *Messersmith v. American Fidelity Co.*, 187 App. Div. 35, 175 N.Y. Supp. 169 (1919), *aff'd*, 232 N.Y. 161, 133 N.E. 432 (1921), which involved illegality merely incidental to the contract sued on. There a provision in a car insurance policy relieved the insurance company of liability for accidental injuries or death occurring when the insured was engaged in an unlawful act, if such act was a statutory offense. The court held that the company was not relieved of liability on the policy where the policy holder's son had an accident while driving without a license in violation of statute. The policy was held to be a legal contract based on adequate consideration which was not made void by an entirely distinct and disconnected act.

In its opinion in the principal case, the majority stated that the holding was to govern only cases in which the illegal performance of a contract originally valid takes the form of commercial bribery or similar conduct and those in which the illegality is central to or a dominant part of the course of conduct which the plaintiff followed in performing the contract. The court distinguished the situation in which a depositor sued his bank for money deposited which was acquired by the depositor by the performance of an illegal contract. The defense that the money was obtained illegally is not available to the depository. See *Southwestern Shipping Corp. v. National Bank,* 6 N.Y.2d 454, 160 N.E.2d 836, 190 N.Y.S.2d 352 (1959).

Judge Froessel's dissent suggested that the decision will present problems in determining the connection between the illegal act and the valid contract. Furthermore, opportunity is afforded a party to a valid contract, under which he has profited, to avoid payment if the other party commits some illegal act in the performance of the contract. The result, it was stated, will not be to prevent or restrain illegal practices, but will encourage persons to seek escape from performing their obligations under valid contracts.

This suggestion by the dissent that the decision will result in fraudulent practices seems to disregard the probability that the decision will prevent, rather than encourage, illegal practices of this type. The loss of commissions will be a deterrent to such practices. The decision will encourage the non-performance of valid contracts only where the plaintiff has performed his obligations by committing an illegal act comparable to that involved in the principal case.

While the decision may appear harsh as to the party seeking recovery, the fact remains that he has by his own action deprived himself of a right to performance as against the other party to the contract. The decision of the majority in *McConnell* to leave him where he has placed himself seems sound.

J. R. K.

CRIMINAL LAW—ASSAULT—SPECIFIC INTENT—UNLOADED FIREARM— *People v. Wood* (New York, App. Div., 1960)

Section 242(4) of the New York Penal Law, which defines assault in the second degree as the act of one who "wilfully or wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm," has been construed as not including an assault with an unloaded firearm used in a conventional firing position. Such an assault was held to be a third degree assault, even though the defendant may have acted with the intent to assault. *People v. Wood,* 10 App. Div. 2d 231, 199 N.Y.S.2d 342 (1960).

On the evening in question, complainants had driven defendant's estranged wife to visit her children at the house where the defendant and the children were staying. As complainants waited in their car on the highway, defendant accosted them with foul language and pounded on the car windows. When they drove away, defendant followed in his car and used it to block them in the driveway into which they had driven. He then took a shotgun from his car and approached them on foot. According to the complainants' testimony, when he came within a short distance of their car, he raised the gun to his shoulder, aimed it at them, and said: "You see this. I will get you yet!" *People v. Wood, supra* at 232, 199 N.Y.S.2d at 344. Neither complainant knew whether the gun was loaded at the time, although the testimony revealed that they were put in great fear by it. After a few moments, defendant lowered the gun and departed.

Defendant was indicted and tried for assault in the second degree under section 242(4) of the Penal Law. Upon the trial, he claimed that he had presented the gun to complainants in the "port arms" position and had called their attention to it. He testified he had not aimed it at them or threatened to get them, and that the gun was unloaded at the time.

At the trial, the court instructed the jury that it is unnecessary to a conviction for second degree assault that the gun used be loaded. It ruled that specific intent to cause grievous bodily injury to the person assaulted is not an element of the crime charged, and that for the defendant to be convicted of assault in the second degree, it need only be proved that he acted with the intent to frighten the complainants. Defendant excepted to this portion of the charge and appealed his judgment of conviction.

The appellate division reversed, one justice dissenting, on the grounds that (1) the court erred in failing to charge clearly that specific intent to injure is a necessary element of assault in the second degree, and, (2) as a matter of law, an assault with an unloaded firearm used in a conventional firing position is not a second degree assault since the weapon used is not one "likely to produce grievous bodily harm," as required by the statute.

In support of the first ground for reversal, the court cited the rule formulated in *People v. Katz,* 290 N.Y. 361, 49 N.E.2d 482 (1943), that to commit an assault in the second degree, the defendant must act with the specific intent to inflict serious bodily injury over and beyond an intent merely to commit the assault. The *Katz* case had applied this requirement of specific intent to a situation arising under subdivision 3 of section 242 of the Penal Law, where defendant had broken the victim's jaw with his bare fists. The court in that case indicated explicitly that specific intent to commit bodily harm would also be required as an element of assault in the second degree under subdivision 4 of the same section. Hence, the first ground of the decision in the principal case is based upon the rationale of the *Katz* case, though a different subdivision of the assault statute is involved. On this basis, the court, in the principal case, reasoned that a mere intent to frighten the complainants would be insufficient to support a conviction for second degree assault, and that a jury charge not specifying specific intent to inflict grievous bodily harm as an element of assault in the second degree would clearly be reversible error.

The rationale applied by the court in arriving at its second reason for reversing the defendant's conviction was to equate "present ability" with the word "likely" in section 242(4) of the Penal Law. In this manner, the court decided that one menacingly pointing an unloaded shotgun at another lacks the requisite present ability to inflict the threatened injury. On the basis of defendant's uncontradicted testimony that the gun was unloaded and used as a firearm (*i.e.*, not as a club), the court applied the present or actual-ability test and concluded that defendant was improperly charged with assault in the second degree since he did not use a weapon "likely to produce grievous bodily harm."

The appellate division treated defendant's conduct as amounting to a simple criminal assault, since he had the apparent ability to inflict serious injury on his victim. Noting that New York had no decision clearly settling this point, the court relied on dicta in *People v. Morehouse,* 6 N.Y. Supp. 763 (Sup. Ct., 1889), and *People v. Tremaine,* 129 Misc. 650, 222 N.Y. Supp. 432 (Sup. Ct., 1927), as support for the proposition that a criminal assault may be committed by pointing an unloaded firearm at the victim in a threatening manner. However, the court ruled that defendant's acts constituted, at the most, an assault in the third degree, since they lacked the elements necessary for an assault in the first or second degree. N.Y. Penal Law, §§ 240, 242, 244(1).

On the ground that the record of the trial court did not support a conviction for second degree assault, Wood's conviction was reversed on the law and the facts, and a new trial was ordered at which the jury, following a proper charge, might find the defendant guilty of assault in the third degree.

The dissenting opinion argued that a conviction under section 242(4) was proper although defendant merely threatened to inflict injury, provided he had at the time the apparent ability to consummate his threat. It pointed out that, since knowledge of whether the gun was loaded at the time of the assault would usually be exclusive to the defendant, the prosecution would be put to an unreasonable burden if required to prove that the gun was in fact loaded. The dissent advocated treating a defendant's claim that the firearm was unloaded as a matter of defense to be proved by him. It was stated that a *prima facie* case of second degree assault had been made out, and that the question of the gun's condition at the time of the assault should have been left for the jury to decide on the basis of the defendant's credibility.

The issue involved in the principal case is important, since its determination establishes that an assault like that in *Wood* is a misdemeanor rather than a felony. Assaults with unloaded firearms used in a conventional firing position represent a relatively unexplored area of the law of New York. Few cases in this state have specifically considered this kind of assault, and then only by way of dicta. See *People v. McKenzie,* 6 App. Div. 199, 39 N.Y. Supp. 951 (1896), *People v. Morehouse, supra,* and *People v. Tremaine, supra.*

A pivotal question in the principal case involves the interpretation of section 242(4) of the Penal Law, particularly the phrase "a weapon . . . likely to produce grievous bodily harm." Should "likely" be construed as referring to the defendant's belief or knowledge concerning the weapon's capacity to produce injury, to the victim's belief as to defendant's ability to effectuate his threat of injury with the weapon used, or, as in the *Wood* decision, to the weapon's actual capacity to inflict harm? A determination of the type of intent necessary to an assault in the second degree is closely related to the interpretation problem. The appellate division in *Wood* reasoned that a defendant who knows that he is acting without the actual ability to inflict harm on his victim could not be said to be acting with the specific intention to produce such harm. Therefore, the court ruled that for a defendant to have the specific intent required to constitute an assault under section 242(4) of the Penal Law, he must knowingly act with the present actual ability to inflict injury. However, if "likely" in section 242(4) is construed as referring to the victim's belief as to the defendant's ability to execute his threat of injury, specific intent to injure on the part of the defendant would obviously not be an element of second degree assault within the meaning of that provision. If "likely" is interpreted to refer to the defendant's belief concerning the functional capacity of the weapon, he could clearly act, under a misapprehension that the gun was loaded, with the intent to cause serious injury and yet without the present ability to injure required by the *Wood* decision. In this problem of interpretation, the court in *Wood* regarded itself as bound by the rationale of *People v. Katz, supra,* which announced the requirement of specific intent to inflict injury as an element of any assault in the second degree.

A further question arises concerning the scope of the requirement of specific intent set forth in the majority opinion in the principal case. How far will the rule that one cannot commit an assault in the second degree with an unloaded firearm, used as a firearm, be extended? It could conceivably be applied to situations where the defendant brandishes a loaded firearm that he knows is incapable of being discharged at the moment of the assault because of some mechanical defect or because the safety mechanism is on. In such situations, it is reasonable to expect that the court, in appraising the criminality of defendant's acts, should consider the well-known high accident ratio arising from the unexpected discharge of such weapons, and perhaps impose a heavier penalty on him than that for assault in the third degree. In deciding that a second degree assault cannot be committed with an unloaded firearm used conventionally, the *Wood* case represents a new and possibly controversial development in the criminal law of New York.

S. S. D.

CRIMINAL LAW—CONSTRUCTION OF NEW YORK FELONY MURDER STATUTE—REJECTION OF PROXIMATE CAUSE THEORY—*People v. Wood* (New York, 1960)

In *People v. Wood,* 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960), the court of appeals refused to apply the New York felony murder statute, section 1044 of the N.Y. Penal Law, where the homicide had been committed by someone other than the defendant himself or one of the other principals engaged in the commission of the felony.

In construing the statute, the court stated as a matter of law that in order to convict a felon of murder in the first degree, the homicide must be committed by one of the principals in the felony acting in furtherance of the common purpose. This decision rejected the proximate cause theory applied by several other states under which a felon is held responsible for any homicide which is a proximate and foreseeable result of his felonious act, regardless of who actually commits the homicide. Section 1044 provides, in part, that the killing of a human being, unless it is excusable or justifiable, is murder in the first degree, "when committed without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise. . . ."

The homicides in the *Wood* case resulted from wounds accidentally inflicted by one Gibson, who had come to the aid of a police officer in apprehending the defendant. Wood and another tavern patron became involved in an argument in front of Gibson's tavern during which Wood drew a gun and seriously wounded his adversary. Hearing the shots, a police officer in the area approached the defendant to investigate the shooting. Wood thereupon fired at him in an attempt to avoid arrest. The defendant and the police officer continued to exchange gun fire until Wood escaped in an automobile. In response to cries for help from the crowd which had gathered, Gibson, armed with a rifle, came out of his tavern and joined the officer in firing at the fleeing car. The ensuing exchange of gunfire resulted in the deaths of a bystander and defendant's companion driving the car. It was subsequently determined that the two victims had been killed by bullets fired from Gibson's rifle.

Upon these facts the grand jury handed down two indictments against Wood, one of which charged him with the willful and felonious murder of the two decedents with malice aforethought. The assault by Wood upon the police officer was the underlying felony upon which the murder charge was based. Defendant then made the motion, upon which the court of appeals ultimately ruled, to dismiss this indictment on the ground that the evidence before the grand jury was insufficient as a matter of law to sustain the indictment.

The motion was granted by the county court, which concluded that it was the intent of the legislature in enacting the statute that the killing must be committed by one of the principals engaged in the commission of the felony. Since an inspection of the grand jury minutes disclosed that the murder charge was based upon the deaths caused by Gibson the court ruled that this construction of the statute barred any felony murder prosecution against the defendant. This conclusion resulted not only from the court's construction of the New York statute but also from its accompanying rejection of the prosecution's contention that the indictment was justifiable under the proximate cause theory. In rejecting that theory, the court noted the dissimilarity between the statutes of jurisdictions following the proximate cause theory and the New York statute. 18 Misc. 2d 893, 897, 186 N.Y.S.2d 141, 144 (Nassau County Ct. 1959).

The appellate division affirmed the order dismissing the indictment and gave the statute the same construction as did the county court, specifically rejecting the People's contention that the term "committed" in the statute could be construed to include an act by the felon which results in the death of a person, though directly caused by one not a principal in the underlying felony. 9 App. Div. 2d 433, 434, 195 N.Y.S.2d 133, 134 (1959).

The court of appeals concurred with the lower courts, focusing its affirmance upon the absence of any agency relationship between the defendant felon and the person committing the homicide in the principal case. It was stated that this element is necessary in order for criminal responsibility to attach to a felon for a homicide not directly committed by him. Since the statute does not require the existence of actual malice or design to cause death in a felony murder prosecution, the court reasoned that the malice or intent inferred from the underlying felony, which is used as a legal fiction to justify a murder charge, cannot be imputed to an act done by one who is not a principal in the felony. It was therefore concluded that the agency relationship exists only among those acting towards the same felonious objective, and not between the felons and one obviously acting in direct resistance to their common objective as did Gibson in the case at bar. The court of appeals thus repeated the lower courts' rejection of the proximate cause theory, basing its rejection not only upon the express language of the statute but also upon the absence of the agency element. 8 N.Y.2d 48, 51, 167 N.E.2d 736, 739, 201 N.Y.S.2d 328, 332 (1960).

The construction of the New York statute expressed by this decision has been inherent in all previous felony murder decisions in this state. The *Wood* case is unique in that it was the first attempt by the State to prosecute under the statute where it was uncontroverted that the homicide was not committed by a person engaged in the commission of a felony. The prior decisions show that murder convictions have been sustained only where the homicide was committed by one of the principals in the felony. See *People v. La Marca,* 3 N.Y.2d 452, 144 N.E.2d 420, 165 N.Y.S.2d 753 (1957); *People v. Luscomb,* 292 N.Y. 390, 55 N.E.2d 469 (1944); *People v. Elling,* 289 N.Y. 419, 46 N.E.2d 501 (1943); *People v. Lytton,* 257 N.Y. 310, 178 N.E. 290 (1931); *People v. Udwin,* 254 N.Y. 255, 172 N.E. 489 (1930); *People v. Sobieskoda,* 235 N.Y. 411, 139 N.E. 558 (1923).

The indictment for felony murder in the *La Marca* case was based upon a homicide allegedly committed by the defendant while engaged in the kidnapping of the victim. Similarly, the defendant charged with murder in the *Lytton* case was the person claimed to have fired the fatal shot while committing a robbery. In that case, the court asserted that it was essential that the homicide be perpetrated by one of the persons engaged in the underlying criminal act in order for the malice of the felony to attach to the act which resulted in the death.

In the decision of the court in the principal case, a great deal of weight was given to the holding in *People v. Udwin, supra.* The defendants in that case were principals in an attempted escape from prison during which one of their confederates was killed by a stray bullet. Upon trial it was conclusively shown that the bullet causing death had been fired by one of the convicts engaged in the escape. The trial judge charged the jury that, as a matter of law, the defendants could be convicted only if the People had shown beyond a reasonable doubt that the shot causing death was fired by one of the convicts acting in concert with the defendants towards their common purpose. The court of appeals affirmed the conviction of the defendants in the *Udwin* case, holding the charge to be a correct statement of the law. In the principal case, the court of appeals cited the *Udwin* case as marking the extent to which the court will go when the death is not directly caused by the defendant.

Where an agency relationship is lacking, the court of appeals will not convict a felon of murder even where the homicide was perpetrated by one of his accomplices. That court has held that if the homicide was not committed by the accomplice in furtherance of the common purpose, responsibility for the act can not be attributed to the other principals in the felony. *People v. Elling,* 289 N.Y. 419, 46 N.E.2d 501 (1943); *People v. Ryan,* 263 N.Y. 298, 189 N.E. 225 (1934); *People v. Sobieskoda,* 235 N.Y. 411, 139 N.E. 558 (1923); *People v. Marwig,* 227 N.Y. 382, 125 N.E. 535 (1919); *People v. Marendi,* 213 N.Y. 600, 107 N.E. 1058 (1915). Presumably the holdings in these cases would have been overruled if the court of appeals had sustained the indictment in the *Wood* case. The court of appeals emphasized that there was no agency relationship between Wood and Gibson since Gibson was obviously not acting towards a common objective with Wood when he fired his rifle at the fleeing auto. No weight was given therefore to the People's contention that under the statute Gibson could be considered as a person engaged in the commission of a felony by Wood.

In discussing the out-of-state cases cited by the People to support the proximate cause theory, the court of appeals in the *Wood* case stated that its application in felony murder prosecutions in New York would not be possible in view of the express wording of the statute which requires the homicide to be committed by a person engaged in the commission of a felony. Such a theory would permit the prosecution of felons for homicides committed by anyone during the felony provided proximate causation were proved. See *People v. Wilburn,* 49 Cal. 2d 714, 321 P.2d 452 (1957); *People v. Krauser,* 315 Ill. 485, 146 N.E. 593 (1925); *People v. Podolski,* 332 Mich. 508, 52 N.W.2d 201 (1952); *Miers v. State,* 157 Tex. Crim. 572, 251 S.W.2d 404 (1952). The rationale underlying these decisions is that since the felon sets in motion a chain of events which could forseeably result in the taking of a life, he should be held responsible for any such homicide regardless of who directly causes it.

People v. Podolski, supra, is a good illustration of the application of this theory. In that case, the defendant was convicted of murder in the first degree for the death of a police officer occurring while the defendant was engaged in a bank robbery. Two police officers attempted to thwart the robbery and the ensuing gun battle resulted in the death of the decedent, which was apparently caused by a bullet fired by his fellow officer. The issue as to who actually fired the fatal shot was dismissed by the Michigan court as being immaterial to the conviction under the state's felony murder statute. That statute provides that "all murder . . . which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder in the first degree. . . ." Mich. Stat. Ann. ch. 286(a), § 28.548 (1954). Under this statute the Michigan court in the *Podolski* case stated it was not necessary that the homicide be committed by one of the principals in the felony so long as the death occurred as a natural consequence of the defendant's felonious act.

The decision in *People v. Wood,* rejecting the proximate cause theory and confining the application of the statute solely to homicides committed directly by a felon, is an express statement of a limitation upon the statute which the New York courts have uniformly observed in previous felony murder prosecutions. Restrictions upon the application of the felony murder doctrine are common in nearly all jurisdictions because a broad interpretation of the provision would obviously produce harsh results. New York limits its application today by requiring that the death must be directly caused by the felon. The Michigan statute applied in the *Podolski* case illustrates how the scope of the doctrine may be limited by restricting its application to certain violent felonies enumerated in the statute.

Since the effect of the felony murder statute is to make a homicide caused without actual malice or intent murder in the first degree, it should be cautiously applied. The result in *People v. Wood* indicates that the court of appeals is not desirous of broadening the application of the statute in New York.

G. S. M.

CRIMINAL LAW—STATE WIRETAP EVIDENCE ENJOINED—*Pugach v. Dollinger,* (2d Cir. 1960)

Since the enactment of § 605 of the Federal Communications Act, 47 U.S.C. § 605 (1958), which makes it a federal crime to intercept and divulge any telephone communication without the consent of the sender, the courts have been repeatedly called upon to determine whether the statute is binding upon states whose procedure makes wiretap evidence admissible in criminal prosecutions. In *Pugach v. Dollinger,* 275 F.2d 503 (2d Cir. 1960), the court of appeals decided that divulgence of wiretap evidence by state law enforcement officers at a state trial would constitute a federal crime in futuro, and the disclosure of that evidence was temporarily enjoined.

The evidence in question had been obtained pursuant to a court order from the supreme court of New York. The order was authorized by the N.Y. Const. art. I, § 12, which states that *ex parte* orders shall issue only upon oath that there is reasonable ground to believe that evidence of a crime may be procured from the interception of telephone communications. As a result of the disclosure of evidence thus obtained, a grand jury indicted Pugach for the crimes of burglary, maiming, assault, and conspiracy.

Before the prosecution proceeded to trial, the plaintiff brought an action in the district court for a permanent injunction against the defendants. In his complaint plaintiff alleged that the Federal Communications Act prohibited the interception and disclosure of a communication without the consent of the sender and that the defendants were about to commit a federal crime by divulging wiretap evidence at his trial. Plaintiff's motion for a temporary injunction was denied. From that decision plaintiff appealed to the court of appeals, Second Circuit, and moved for a stay pending the hearing of the appeal. The court held that the defendants would be temporarily enjoined from divulging the wiretap evidence until the hearing and determination of the plaintiff's appeal.

In establishing the basis for its decision the circuit court cited *United States ex rel. Graziano v. McMann,* 275 F.2d 284 (2d Cir. 1960). In that case defendant was convicted in a New York court of robbery in the first degree after material evidence was admitted that had been procured by state-authorized wiretaps. *People v. Graziano,* 3 App. Div. 2d 1010, 165 N.Y.S.2d 445 (1957), *aff'd,* 4 N.Y.2d 881, 150 N.E.2d 768, 174 N.Y.S.2d 465 (1958), *cert. denied,* 358 U.S. 851 (1958). The circuit court of appeals stated that *Schwartz v. Texas,* 344 U.S. 199 (1952), was sound authority for the principle that the admission of wiretap evidence in a state court was a state rule of evidence not precluded by the Federal Communications Act. Since the evidence had already been disclosed it was a moot question whether the divulgence of it could be enjoined. Therefore, in the principal case, if Pugach were not granted a temporary injunction and the defendants were to testify as to the intercepted communications, plaintiff might well be convicted, and the issue of whether or not the divulgence of wiretap evidence could be enjoined would be moot, as was illustrated in the *Graziano* case.

The district court below dismissed Pugach's complaint in accordance with the holding in *Stefanelli v. Minard*, 342 U.S. 117 (1951), that an injunction would not issue to prevent state officers from presenting evidence obtained in an illegal search and seizure. The circuit court of appeals distinguished the *Stefanelli* case. There the illegal search and seizure had already taken place and there was nothing to prevent the admission of the evidence at the trial. In the principal case, that which is enjoined is the future divulgence of evidence obtained from wiretapping. The statute makes it a crime to intercept *and divulge* any communication without the consent of the sender. Here a federal crime will be committed if the court fails to grant a temporary injunction.

In *United States v. Benanti,* 244 F.2d 389 (2d Cir. 1957), the defendant was convicted on the basis of wiretap evidence obtained by New York officers. The circuit court took the position in that case that despite the warrant issued pursuant to New York law, the state officers violated the Federal Communications Act when they divulged, at the federal trial, evidence obtained by wiretapping. The court upheld Benanti's conviction, however, on the grounds that the federal officers had not participated in the wiretapping and had no knowledge of it until the trial. That decision was reversed in *United States v. Benanti,* 355 U.S. 96 (1957). It was held by the Supreme Court that wiretap evidence is not admissible in a federal court regardless of the fact that it was obtained by state officers without the knowledge of the federal officers.

Justice Medina, in the principal case, gave great weight to the fact that although the decision of the circuit court of appeals in the *Benanti* case was reversed by the Supreme Court, its determination that the New York officers had violated the Federal Communications Act was not disturbed. Therefore, if Pugach's prayer for a temporary injunction was denied the court would, in effect, acquiesce in the commission of a federal crime in futuro.

Prior to the *Pugach* decision, it had been uniformly held that the Federal Communications Act did not preclude the admission of wiretap evidence in a state criminal prosecution. *United States ex rel. Graziano v. McMann, supra*; *People v. Variano*, 5 N.Y.2d 391, 157 N.E.2d 857, 185 N.Y.S.2d 1 (1959); *People v. Stemmer*, 298 N.Y. 728, 83 N.E.2d 141 (1948); *Schwartz v. Texas, supra.* In the *Schwartz* case petitioner had been convicted in a state court by reason of wiretap evidence. He contended that the records of the intercepted communications were inadmissible as evidence without his consent. The Supreme Court held that the communications were not barred by the Federal Communications Act, because the evidence was obtained for a criminal proceeding in a state court. Although the disclosure of the intercepted communications would be a violation of the federal statute, it is within the discretion of the state in formulating its rules of evidence to accept such records in evidence. The Court pointed out that enforcement of the Federal Communications Act could be achieved under the federal penal provisions, 47 U.S.C. § 501 (1934), which provide for the punishment by fine, imprisonment, or both, of anyone who violates the Act.

In the principal case, the dissenting opinion expressed a willingness to extend the rule set out in the *Schwartz* case. The objection to granting injunctive relief was that, in doing so, the court was intervening in the proceedings of the state court. The federal court was, in effect, thwarting a well established New York rule that the courts will not take notice of how evidence was obtained when it is material and properly offered in court. *People v. Adams*, 176 N.Y. 351, 68 N.E. 636 (1903); *People v. Richter's Jewelers*, 291 N.Y. 161, 51 N.E.2d 690 (1943). The dissent relied heavily upon the language in *United States v. Benanti*, 355 U.S. 96, 101 (1957), ". . . that despite the plain prohibition of Section 605, due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear intention to that effect."

It has been stated in the principal case and in *Schwartz v. Texas, supra*, that the disclosure of wiretap evidence is a violation of the Federal Communications Act and is, therefore, a crime. A further question then arises as to whether the circuit court should enjoin a crime. It has been the general rule that equity will not undertake to enjoin the violation of the criminal laws. *United States v. Seibert,* 2 F.2d 80 (N.D. W.Va. 1924); *In re Debs*, 158 U.S. 564 (1895). However, there is authority to the contrary in *Milliken v. Stone*, 7 F.2d 397 (S.D. N.Y. 1925), where it was held that it is elementary that a court of equity may, in a proper case, enjoin a threatened act even though that act be criminal. It remains for the court of appeals to determine whether *Pugach v. Dollinger, supra,* is a proper case.

It is submitted that the *Pugach* case is not a proper one to enjoin a criminal act. *Schwartz v. Texas, supra,* indicated that penal enforcement of the statutory prohibition could be achieved pursuant to 47 U.S.C. § 501 (1934). *Schwartz* also held that in the absence of a contrary expression by the Congress, the Court would not extend the Federal Communications Act so as to thwart a state rule of evidence. This was also the language used in *United States v. Benanti*, 355 U.S. 96 (1957), when the Court referred to the *Schwartz* case.

It is suggested that an extension of the decision in the principal case would not be a regulation of a state's rules of evidence per se, since the injunction is a mandate to the law enforcement officers and not to the New York court. However, such a decision would have a regulatory effect and would certainly inhibit a state rule of evidence. The injunction prayed for in plaintiff's complaint would make the wiretap evidence inadmissible at his trial and that would be contrary to the New York rule that any evidence is admissible as long as it is material and properly introduced. *People v. Adams, supra*; *People v. Richter's Jewelers, supra.* It is suggested, therefore, that a permanent injunction should be denied.

D. B. C., III

DAMAGES—CARRIERS—LIMITED LIABILITY—EFFECT OF FAILURE TO CHARGE RATE SPECIFIED IN FILED TARIFF—*W. R. Grace & Co. v. Railway Express Agency,* (New York, 1960)

Unless a shipper is given a choice of rates, an interstate carrier cannot limit its liability to less than the true value of the article shipped. *W. R. Grace & Co. v. Railway Express Agency, Inc.,* 8 N.Y.2d 103, 168 N.E.2d 362, 202 N.Y.S.2d 281 (1960).

The plaintiff's action was to recover the value of a shipment of platinum which disappeared after it had been entrusted to the defendant express agency for interstate shipment. Defendant's truck driver received from plaintiff's representative a box containing approximately $56,000 worth of platinum, addressed to a consignee in Pennsylvania. The driver asked the sender to identify the contents and to declare the value to be placed thereon. In response he was told that it contained platinum and that the declared value was fifty dollars. The driver thereupon filled out an ordinary merchandise receipt stating the contents of the package as "platinum" with a declared value of fifty dollars. Under the provisions of the receipt, the express agency's liability was limited to the declared value. The sender paid the merchandise rate usually charged for packages of such weight and declared value. At the freight terminal the box was placed in defendant's "value room" after the driver informed the clerk that the shipment consisted of platinum. After its deposit in this room, defendant kept no further record of the shipment.

At the time of this transaction the defendant had on file with the Interstate Commerce Commission an official tariff classification as required by section 6(1) of the Interstate Commerce Act. 49 U.S.C. § 6(1)(1958). This tariff contained two distinct classifications: a "merchandise" classification which applied to ordinary merchandise, and a "money" classification applicable to money, precious metals and other valuable articles. According to the tariff, precious metals could only be received and transported by the carrier if categorized as "money." This classification, as distinguished from the one pertaining to merchandise, did not provide for a choice of rates depending on the declared value of the shipment, its provisions expressly providing that platinum must be transported under rates computed on the basis of the actual value of the goods shipped.

The trial court found that the shipper, in order to save the difference between the precious metal rate ($133.93) and the regular merchandise rate ($2.90), had concealed the contents of the shipment. Although the defendant was found liable to the plaintiff for the loss, the trial court limited the plaintiff's recovery to the declared value of fifty dollars. The appellate division modified the judgment and made new findings of fact, namely, that plaintiff had not concealed the contents of the shipment, and that defendant had not established a valid contractual limitation under its tariff, since the merchandise classification with its limitation of liability did not apply to platinum shipments. The judgment as modified, allowed plaintiff to recover the full value, $56,000. The main issue which faced the court of appeals was whether damages should be determined in accordance with the express receipt or with defendant's filed tariff. The court decided that the tariff was determinative.

This decision was based mainly upon rules set forth in a similar case decided two years before the principal case. In *New York & Honduras Rosario Min. Co. v. Riddle Airlines,* 4 N.Y.2d 755, 149 N.E.2d 93, 172 N.Y.S.2d 168 (1958), a shipment of dore (gold and silver bars), which was classified by the tariff as precious metals the same as the platinum in the principal case, was received by defendant Riddle for interstate shipment. The original bill of lading, issued by a Honduran airline, Transportes Aereos Nacionales, had described the shipment as dore and limited liability to one hundred dollars. Defendant Riddle was not informed as to the actual value of the contents and collected charges computed by weight only. Under its tariff filed with the Civil Aeronautics Board, Transportes Aereos Nacionales, the original carrier, was permitted to limit its liability on value shipments. Riddle was not allowed such a limitation under its tariff. Upon loss of the shipment the court held Riddle liable for the actual value, $28,000. The limitation of liability found in the original bill was held ineffectual since such limitation was not authorized in defendant's legal tariff.

Under the common law it is possible for a carrier, through a reasonable contract provision, to limit his liability for loss or damage to a shipment. This is generally done by giving the shipper a choice of rates, the difference in the rates in each case being in proportion to the risk involved. A condition limiting the carrier's liability is attached to the lower rate. Thus, if the shipper freely chooses a lower rate by declaring a certain value, he is later estopped from asserting a higher value for the purpose of recovering in an action against the carrier for a loss. The value thus declared is binding, regardless of the actual value of the shipment. *Pierce Co. v. Wells, Fargo & Co.,* 236 U.S. 278 (1915).

It is upon this theory that the defendant in the principal case sought to limit its liability. Relying on the rule set out in *Kansas City So. Ry. v. Carl,* 227 U.S. 639 (1913), that the shipper's knowledge of the lawful rate is conclusively presumed, defendant in the principal case contended that the plaintiff shipper, knowing the applicable rates, intentionally chose the lower and is now estopped from asserting a greater value than the declared fifty dollars. In reply to this contention the plaintiff relied on the terms of the defendant's tariff and on the decisional law pertinent to such tariffs. According to W. R. Grace & Co. there was no choice available, since there was no provision in the money classification for a declared value limiting liability on shipments of precious metals.

The holding in the *Rosario* case follows the settled rules relied upon by the majority decision in the instant case in the court of appeals: (1) unless a shipper is given a choice of rates, an interstate carrier cannot limit its liability to less than the true value; (2) a carrier cannot charge or receive a rate different from that specified in its currently effective tariff; and (3) it is the regulatory scheme of the Interstate Commerce Act which governs, not the common law.

Numerous decisions have established that the filed rates are absolutely binding upon all parties to a contract for interstate transportation. They have the force of statute law and a carrier cannot lawfully depart from them on any pretext. *Dayton Coal & Iron Co. v. Cincinnati, N.O. & Tex. Pac. Ry.*, 239 U.S. 446 (1915); *Erie R.R. v. Stone,* 244 U.S. 332 (1917). An agreement between an interstate carrier and a shipper to limit the carrier's liability upon an interstate shipment to a valuation stated in the bill of lading will not relieve the carrier of its common law obligation to pay the actual value in case of loss by its negligence if its schedules filed with the Interstate Commerce Commission provide but one rate applicable to the shipment. *Burke v. Union Pac. R.R.*, 226 N.Y. 534, 124 N.E. 119, (1919), *aff'd, Union Pac. R.R. v. Burke,* 255 U.S. 317 (1921); *Pennsylvania R.R. v. International Coal Co.,* 230 U.S. 184 (1913).

It should also be noted that the contract of carriage itself consists of the appropriate receipt and the carrier's lawful schedules and classifications on file with the Interstate Commerce Commission. *Strahs v. N.Y.C.R.R.*, 113 Misc. 273, 184 N.Y. Supp. 362 (1920); *American Cotton Prod. Co. v. N.Y.C.R.R.*, 142 Misc. 821, 255 N.Y. Supp. 672 (1932); *Feynman v. American Railway Express Co.*, 134 Misc. 223, 234 N.Y. Supp. 727 (1929); *Burke v. Union Pac. R.R., supra.* The *Kansas City So. Ry.* case, *supra,* pointed out even more emphatically, that neither an intentional nor accidental misstatement of the applicable rate will bind the carrier or shipper. The lawful rate is that which the carrier may exact and that which the shipper must pay.

Relying on this group of cases, plaintiff in the principal case contended that the defendant was bound to issue the appropriate receipt. Having but one applicable rate for platinum, defendant could not lawfully provide for a limitation on the bill of lading. With such limitation ineffective, defendant's liability can only be determined by the rules of common law.

The case seems to revolve around this key question: Was there actually a misstatement of the rate applicable to this particular shipment? As already pointed out, according to the plaintiff the only rate possible was that provided by the "money" classification. In order to substantiate its claim that a choice of rates was available, the express agency introduced testimony in the lower court tending to prove that it was authorized by its tariff to ship articles manufactured from precious metals, including platinum, under the "merchandise" classification. The defendant alleged that since W. R. Grace & Co. failed to state exactly the nature and value of the shipment, the driver was therefore justified in issuing the merchandise receipt. Defendant further alleged certain violations of the tariff by W. R. Grace & Co. since it failed to label properly the shipment in the manner prescribed by the regulations. The defendant contended that plaintiff, in fact, concealed the true value from the driver and that such deception should preclude the recovery sought by the plaintiff.

Although the defendant's contentions on this last point were not mentioned in the majority opinion, they apparently form the basis for both the trial court decision and the dissenting opinion in the court of appeals. The trial court clearly indicated that although the driver was told the box contained platinum he did not know the actual value of the contents. The court observed that he had no way of knowing the value to be other than as stated. *W. R. Grace & Co. v. Railway Express Agency, Inc.*, 17 Misc. 2d 992, 997, 182 N.Y.S.2d 694, 698 (1958). The dissenting opinion in the court of appeals is based upon the same facts. The Railway Express Agency had no knowledge of the actual value of the shipment; it relied justifiably upon the plaintiff's indication of value and could in no way ascertain whether the articles were worth more than fifty dollars. Since no intentional circumvention of the Interstate Commerce Act could be found, the dissenting justices were of the opinion that the defendant should not be penalized for its good faith reliance on the plaintiff's representations.

Various factors indicate that the holding in this case could prove to be a hard one. In this instance defendant's driver received the platinum in a box completely wrapped, sealed, but not with wax or lead as the opinion stated was customarily required for precious metals. There was nothing on the package to show the nature of the contents or their value and the driver was not at any time told the actual value. He drove an unarmed truck and had not previously engaged in the carrying of precious metals. Presumably a man of average intelligence, he had a limited knowledge of precious metals. It is not unreasonable to assume that he could have supposed that this platinum, so described and valued, was in an infinitesimal amount, perhaps used in the plating of ornaments, and therefore was eligible for shipment under the "merchandise" classification.

The plaintiff, aware of the value of the platinum, accepted the receipt of the driver fixing the company's liability at fifty dollars. It chose not to declare the true value and failed to describe the shipment or seal it as required, as if to disguise its valued contents. The plaintiff accepted the risks of a merchandise shipment, knowing that the armed guards and all the protective measures with which the defendant surrounded shipments of precious metals would be lacking. It should not recover, under authority of the regulation it wilfully ignored, at the expense of the shipper who, of the two parties, acted in good faith in charging a rate commensurate with the declared value. The decision seems to place a heavy burden upon the carrier. In many cases, it may not be practicable for the carrier to take protective measures to ascertain that the contents of packages are correctly stated and the proper tariff charged.

E. J. T.

MUNICIPAL CORPORATIONS—TORT LIABILITY—SEPARATION OF POWERS DOCTRINE—*Weiss v. Fote,* (New York, 1960)

The separation of powers peculiar to the several branches of government formed the basis of a valid defense to an action against a municipal corporation where the act alleged to have been negligently performed was the discretionary design of a traffic control system by a city board of safety. *Weiss v. Fote,* 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

The *Weiss* case presented to the New York court of appeals an occasion for the reaffirmation of the doctrine whereby discretionary acts of executive bodies fulfilling their planning function within their lawfully delegated authority, may not give rise to an action for damages against the state or one of its civil divisions. In construing section 8 of the Court of Claims Act (1939), the court held that this statute does not completely destroy governmental immunity. Although that legislation makes the legal status of the state and its subdivisions equal to that of an individual or corporation, it does not deprive the state or its subdivisions of defenses arising out of the exercise of executive and administrative functions of government.

The action in the *Weiss* case arose out of an intersection collision between two automobiles in the city of Buffalo. Plaintiff Weiss, who had alighted from a bus just prior to the accident, was crushed against a fire hydrant by defendant Fote's automobile as it was propelled over the curb by the force of the collision. A cause of action was asserted against the owners and operators of both of the vehicles involved and against the city of Buffalo. Plaintiff's action against the city rested upon the contention that the four-second clearance interval allowed by the traffic control system at the intersection had been negligently planned by the Buffalo Board of Safety. It was asserted that the insufficiency of the clearance interval allowed east-west traffic to enter before north-south traffic had completed transit of the intersection. Such negligent design was alleged to be the proximate cause of plaintiff's injury. Upon the trial plaintiff endeavored to establish a breach of the city's duty to its citizens to construct and maintain its highways in a reasonably safe condition.

The trial court instructed the jury to hold the city liable if it found that the interval was in fact insufficient and that the adoption of such an interval as part of the traffic control plan constituted a lack of due care upon the part of the Board of Safety. For the breach of its duty of due care, the municipality was required to respond in damages. In addition, the jury found that neither of the two drivers involved was negligent. In a memorandum decision the appellate division unanimously upheld the judgment entered upon the verdict of the jury. *Weiss v. Fote,* 8 App. Div. 2d 692, 186 N.Y.S.2d 223 (1959).

In the court of appeals, the city contended that liability may not be imposed where the act complained of involves the discretion of a municipal executive body in the performance of its lawfully authorized planning function, at least in the absence of evidence that the plan adopted lacked reasonable basis, and that the submission of its liability for the consideration of the jury was error. Reversing the judgments below, the court held, three judges dissenting, that there was no showing of a breach of a duty owed to the plaintiff by the city. In reaching its decision, the court cited *Urquhart v. City of Ogdensburg,* 91 N.Y. 67 (1883), for the rule that although there is a duty owed to the public to keep streets in reasonably safe condition for travel, courts will not inquire collaterally into the performance of planning functions by officials since an inquiry would obstruct the normal operations of government. In addition, the court of appeals found that the testimony presented at the trial in no way suggested that the decision to establish a four-second clearance interval had been unreasonably or arbitrarily made.

The dissenting opinion took the position that the decision of the majority was restoring an area of governmental immunity, whereas the modern tendency is against the rule of nonliability. It was further asserted in the dissent that in certain situations the liability of a municipality may be predicated upon governmental planning decisions. The dissenting judges also urged that the affirmative act of the Board of Safety, creating a situation in the nature of a trap or nuisance, afforded an alternative basis for imposing liability against the municipality.

Prior to the enactment of the provision for waiver of immunity in the Court of Claims Act, now section 8, the common law had developed a convenient distinction for the application of sovereign immunity in order to determine the liability of municipal corporations. The civil divisions of the state exist and function in a dual capacity. As instrumentalities of the general government of the state, they exercise governmental powers delegated by the legislature. As corporations organized for the benefit of the citizens of a particular subdivision, they exercise proprietary and corporate powers. In the exercise of governmental powers, municipalities were formerly immune from liability, *Urquhart v. City of Ogdensburg,* 91 N.Y. 67 (1883), whereas, acting in their proprietary or corporate capacity, they were subject to liability, *Brusso v. City of Buffalo,* 90 N.Y. 679 (1882); *Storrs v. City of Utica,* 17 N.Y. 104 (1858); *Kavanagh v. City of Brooklyn,* 38 Barb. 232 (N.Y. Sup. Ct. 1862).

By the enactment of section 8 of the Court of Claims Act, the state waived its immunity from liability and action and provided that its liability is to be determined by the same rules of law as the liability of a private individual or corporation. The statutory waiver of immunity, though not in terms applicable to municipal corporations, has been logically extended by the courts to the various civil divisions of the state, *Bernardine v. City of New York,* 294 N.Y. 361, 62 N.E.2d 604 (1945), on the ground that all municipal corporations are instrumentalities, agencies, or politically subordinate subdivisions of the state. *Brown v. Trustees, Hamptonburg School District,* 303 N.Y. 484, 104 N.E.2d 866 (1952); *MacMullen v. City of Middletown,* 187 N.Y. 37, 79 N.E. 863 (1907).

Subsequent to the enactment of legislation waiving the state's immunity, the courts were confronted with the problem of determining the extent of the waiver. On its face, the waiver, as set forth in its present form in section 8, would seem to be an all-inclusive abrogation of the immunity long enjoyed by the sovereign at common law, whether the acts of the sovereign involved a governmental or proprietary function, misfeasance or nonfeasance, commission or omission. See *Runkel v. City of New York,* 282 App. Div. 173, 123 N.Y.S.2d 485 (1953). In *Holmes v. County of Erie,* 266 App. Div. 220, 42 N.Y.S.2d 243 (1943), the negligent operation of a penitentiary by a county, although a governmental function, resulted in liability due to the fact that the county's immunity as an agency of the state had been destroyed. In that case the plaintiff's injury was incurred while working in a prison workshop. Similarly, in *Miller v. City of New York,* 266 App. Div. 565, 43 N.Y.S.2d 79 (1943), the doctrine of sovereign immunity as applied to an agency of the state performing a governmental function, was held to be no longer in existence, and the plaintiff, an assistant deputy sheriff injured while riding in a prison van as a guard, recovered against the city. The broad interpretation of the waiver of immunity under section 8 was established by *Bloom v. Jewish Board of Guardians,* 286 N.Y. 349, 36 N.E.2d 617 (1941). In the *Bloom* case, a corporation created by the legislature to operate a vocational school was held liable for negligently performed duties of supervision on the basis that the state had waived its immunity. The infant plaintiff, an inmate at the vocational school, was injured when, in an attempt to open a window under the direction of a supervisor, his hand slipped and went through the glass.

As an agency or instrumentality of the state and under the power delegated by section 1640(11) of the New York Vehicle and Traffic Law, a city or village may, by means of traffic control signals, regulate traffic on its own streets. In the *Weiss* case, the city, acting through its Board of Safety as an agency to which this power was delegated, might seem to be liable for negligent performance of its functions, as were the agencies in *Bloom* and succeeding cases. If such a view of the *Weiss* case had been adopted, the municipality would not have escaped liability as it would fall within the doctrine of those cases.

Such a theory, however, cannot be sustained when the rationale of *Weiss* is subjected to closer scrutiny. The majority relied upon the case of *Urquhart v. City of Ogdensburg,* 91 N.Y. 67 (1883), and following cases which derive their rationale from *Lansing v. Toolan,* 37 Mich. 152 (1877). The argument is essentially one of policy, predicated upon the doctrine of separation of powers. In order that the planning functions of municipal corporations may properly be carried out, the discretion necessary to administer these planning functions must remain in the control of municipal officers and agencies. Neither the courts nor juries may question this administrative judgment when exercised within lawfully delegated authority.

A similar rule has been followed in the case of a state administrative agency. *Swalback v. State Liquor Authority,* 7 N.Y.2d 518, 166 N.E.2d 811, 200 N.Y.S.2d 1 (1960); *Marburg v. Cole,* 286 N.Y. 202, 36 N.E.2d 113 (1941). To allow intervention by the judiciary would violate the doctrine of separation of powers and render unworkable the entire governmental structure. Where, however, discretionary acts exceed lawfully delegated authority by action which is arbitrary, the courts may order a redetermination of the matter by the administrative agency. *Swalback v. State Liquor Authority, supra.* This would seem to indicate that in a similar situation involving the unlawful exercise of discretionary governmental functions, a municipality may be exposed to liability.

The *Weiss* decision is based upon the separation of powers doctrine which will not allow judicial interference with discretionary executive governmental functions of a municipality and which places control of these matters in the hands of local officers and agencies. A further interpretation of the decision in *Weiss* is the admitted inadequacy of the test for imposing liability as set forth in section 8. Individuals and private corporations may not be equated with the state with respect to legal status. The state and its political subdivisions, by their very nature, do not function in the same manner as individuals or corporations. See *Newiadony v. State,* 276 App. Div. 59, 93 N.Y.S.2d 24 (1949).

The *Bloom* case and those following it, interpreting the statute as an all-inclusive waiver of immunity, are limited by applying the doctrine of separation of powers as was done in the *Weiss* decision. The former cases, however, may be distinguished by the nature of the acts for which relief was sought and the governmental functions which gave rise to the claims. In each instance, although the functions being performed were of a governmental nature, the actual negligence complained of may be characterized as the ordinary lack of due care.

The *Weiss* case, however, does not involve a similar negligent act. The action concerned a governmental unit and its ministerial discretionary planning. The decision of this unit to adopt a particular plan of traffic control, within the scope of its authorized planning function, was deemed not to be subject to judicial review, at least in the absence of evidence that the plan was either evolved without adequate study or lacked reasonable basis.

The decision in the *Weiss* case is a desirable one in that it preserves the discretion of planning bodies which are acting within their lawfully delegated powers and therby maintains the doctrine of separation of powers underlying the government structure.

C. E. C. Jr.

UNFAIR COMPETITION—LITERARY PROPERTY—IMITATION OF RECORDED MUSICAL ARRANGEMENTS—*Miller v. Universal Pictures Co.,* (New York, App. Div., 1960)

A phonograph record manufacturer distributed for public sale an album made from a motion picture sound track which meticulously duplicated the original recordings of a well known orchestra leader and musician. On the grounds that the record distributor's action was a misappropriation of the musician's style and arrangements, and that a contract giving the motion picture company the right to use the orchestra leader's style for music in a picture depicting his life was breached, the widow and executrix of the band leader brought suit against the record company and the picture company for an accounting. The court held that in the absence of palming off or confusion, a performer of copyrighted material contained in a record has no property interest in his "sound." *Miller v. Universal Pictures Co.*, 11 App. Div. 2d 47, 201 N.Y.S.2d 632 (1960) (appeal pending).

Plaintiff was the widow and executrix of the late Glenn Miller, orchestra leader and musician, and as such received royalties from an exclusive recording contract made by the artist with Record Corporation of America and renewed by the plaintiff. In 1952, plaintiff contracted with defendant, Universal Pictures Co., (hereinafter called Universal), for a musical motion picture of the life of Glenn Miller and granted to it the right to simulate the style and manner of playing of the Glenn Miller orchestra for the sound track of the photoplay. The royalties contract contained no provisions relating to commercial phonograph recording rights in the sound track. Universal, after having scrupulously imitated the original Record Corporation of America recordings of the Glenn Miller "sound," gratuitously released the sound track to their controlling stock owner, defendant Decca Records, Inc., (hereinafter called Decca), to be distributed by the latter for public sale in the form of a record album.

The trial court held defendants accountable for the substantial profits received by Decca from the recording, and directed a reference. The appellate division reversed this interlocutory judgment on the grounds that plaintiff had no property interest in the Glenn Miller "sound;" no palming off had been proved; and no negative covenant would be implied from the contract between plaintiff and the photoplay company.

With the development of modern communication media, the product of creative and intellectual activities may become known to others rapidly. Since science has increased the means to reproduce these constructive activities and the performances of artists are easily available, the trend in the law, in order to protect the artist, is towards a more liberalized concept of unfair competition. See *International News Service v. Associated Press,* 248 U.S. 215 (1918). However, piracy of the artist's performance still continues, without redress, due to the reluctance of courts to find any proprietary right of the performer in his work under common law copyright principles.

Statutory copyright is available to the owner of musical compositions, but the protection afforded does not extend to contributions made by an arranger or conductor in the nature of a personal interpretation or rendition of a copyrighted composition contained in a recording. *RCA Manufacturing Co. v. Whiteman,* 114 F.2d 86 (2d Cir. 1940). Nor do the statutory copyright laws permit monopolization of a phonograph record under the present act. 17 U.S.C. § 5 (1958); *Capital Records v. Mercury Records Corp.,* 221 F.2d 657 (2d Cir. 1955). This is not because of any constitutional prohibition, but due to the provisions of the federal copyright law. Common law copyright protection may afford a remedy where the legislature has not provided for a performer's copyright in the present act. *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937). Whether an appropriation in the form of an absolute imitation of Glenn Miller's style and arrangements of copyrighted compositions is a violation of a property right protectable by the common law is the essential question in the instant case.

As a prerequisite to relief under the theory of common law copyright, the work must represent an original intellectual creation. *Supreme Records v. Decca Records,* 90 F. Supp. 904 (S.D. Cal. 1950). Even where this requisite is met the work is protected against unauthorized appropriations only until publication. *RCA Manufacturing Co. v. Whiteman, supra.* The plaintiff in the principal case, attempting to support her position that a sale of a phonograph record does not constitute a publication and surrender of common law rights, relied on the majority opinion in *Capital Records v. Mercury Records Corp., supra.* The majority in the *Capital Records* case held that the public sale of a phonograph record does not destroy the common law property therein. Ostensibly applying New York law in that case, the court relied upon *Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp.*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1951). However, the gravamen of plaintiff's complaint in the *Metropolitan Opera* case was unfair competition and the issue of publication, being but incidental to the main issue and unnecessary for the granting of injunctive relief, was not directly discussed. The *Capital Records* case, the leading case purporting to be decided under New York law for the principle that the sale of a record does not place the composition in the public domain, therefore is founded on a case where the issue of publication was extraneous to the decision. Contrary to the view expressed by the *Capital Records* case are two federal district court cases holding that the sale of a phonograph record constitutes a publication and release of all common law rights. *Mills Music, Inc. v. Cromwell Music, Inc.*, 126 F. Supp. 54 (S.D. N.Y. 1954); *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950). Thus, it would seem that the rule pronounced in the *Capital Records* case might well be reconsidered. See Morrison, *Copyright Publication And Phonograph Records,* 48 GEO. L.J. 683 (1960).

It should also be noted that the case at bar is not concerned with piracy of the precise performance but with an imitation of a performer's style. The appellate division recognized this essential distinction between the cases plaintiff relied upon and the case at bar. The trial court, however, had failed to note that neither the *Metropolitan Opera* nor *Capital Records* case involved a separate performance that imitated the arrangements for which protection was sought. Those cases give protection but limit it to the artist's own performance. Although they suggest an analogy, they do not control even in principle, unless facts are found to support plaintiff's theory that the recording of Glenn Miller's style by Universal was not a mere imitation but a complete reproduction of the original records. Plaintiff contended that since Universal, by using its own orchestra and modern engineering advances, was able to imitate the original "sound" of Glenn Miller, this duplication process constituted copying. The appellate division rejected this reasoning.

The appellate division in the *Miller* case indicated that the case of *Supreme Records v. Decca Records, supra,* is sufficiently analogous to lend support to its holding that plaintiff does not have any property interest in the Glenn Miller "sound," and that in the absence of palming off, which is fraudulent representation of the goods of the seller as those of another, no relief is afforded on the theory of unfair competition. The *Supreme Records* case involved the imitation of musical arrangements of a copyrighted composition. The plaintiff in the *Supreme Records* case, who was not the author, contributed by adding certain embellishments such as emphasis upon accent through the medium of hand-clapping and vocal interpolations. The court stated that in the absence of confusion—deception of the public into believing that the product of the plaintiff was being sold—such a conribution did not result in a musical creation protectable by a common law property right. The court, in the *Supreme Records* case, suggested that a unique, creative contribution by a performer may be protected, but that such "accent" alone, without confusion, was not such a creation.

The logic of the view taken in the *Supreme Records* case is compelling to the extent that the courts are reluctant to allow recovery without proof of "palming off" or "confusion." In the principal case it may reasonably be inferred that the court's silence on the issue of "palming off," which has been the classical theory of unfair competition, suggests an absence of any proof of fraudulent misrepresentation on the part of the defendant, Decca, in the appearance of the record album and through advertisement.

The court rejected the trial court's implication of the existence of a negative covenant that Universal would not compete with the exclusive recording license granted to Record Corporation of America by plaintiff's testator and renewed by plaintiff. Where parties to a contract agree to use property in a certain way, a negative covenant against using the property in any other manner will be implied. *Harper Bros. v. Klaw,* 232 Fed. 609 (S.D. N.Y. 1916); *Herne v. Liebler,* 73 App. Div. 194, 76 N.Y. Supp. 762 (1902). The court's refusal in *Miller* to recognize the necessity of implying a negative covenant was consistent with its holding that plaintiff had no protectable interest in the sound track, under her theory of unfair competition. There was no ground to limit the defendant's right under the contract to use the sound track since that right was not exclusively controlled by the plaintiff.

A new trial was ordered with leave to allow plaintiff to amend her pleadings, and the court suggested a theory of recovery not urged by the plaintiff. Is not a sound track an integral and necessary component of a film? The court indicated a finding in the affirmative would suggest a subversion by Universal of the basis to be used in computing plaintiff's royalties under the contract. It is arguable that if the proceeds from the "sound track" plus the "film" equals the total gross proceeds, then a transfer of one without adequate consideration undermines the very purpose of the contract, namely plaintiff's right to royalties on the photoplay.

The reversal of the trial court seems sound: a contrary holding would have provided the plaintiff with a monopoly that would be limited neither in time nor in use, since the Copyright Act does not provide for the copyright of such "works" and a common law copyright endures indefinitely.

D. T.

Domestic Relations—Foster Care—Protection Orders—*Children's Court Act, Sections 6, 30-a(6)—amended, Section 45-a—New; Social Welfare Law, Section 374(3)—amended.*

A protection order is an order of the court which sets forth conditions of behavior to be observed by husbands or wives, or both. Its purpose is to forbid behavior which is harmful to a child who is under the jurisdiction of the court.

The domestic relations court of the city of New York is comprised of a family court and a children's court. In counties outside New York City, a children's court is provided for. Prior to 1955 the law providing for the issuance of protection orders was as follows: section 92(7) of the Domestic Relations Court Act of the City of New York gave the family court division the power to issue protection orders in support proceedings in which a child or step-child was involved. The children's court division had exclusive jurisdiction of delinquent and neglected children, but it had no authority to grant protection orders. Section 30-a(6) of the Children's Court Act gave children's courts outside New York City the power to issue protection orders in support proceedings in cases where a child or step-child was involved.

In 1955, section 92(7) of the Domestic Relations Court Act was amended by deleting the requirement that a child or step-child had to be "involved" in the case in order to issue a protection order in support proceedings before the family court. Apparently by mistake, a like amendment was not made to section 30-a(6) of the Children's Court Act.

The purpose of chapter 495 of the Laws of 1960 was to bring the two acts into greater conformity and to broaden the power of the courts to issue orders of protection. Section 30-a(6) of the Children's Court Act has been amended by deleting the requirement that a child or step-child must be "involved" before the children's court could issue a protection order in a support proceeding. There have been added both to section 6 of the Children's Court Act and to section 61 of the Domestic Relations Court Act amendments which permit the issuance of a protection order "in any case involving a child within the jurisdiction of the court. . . ." Such an order can be made ". . . in assistance of or as a condition of any other order authorized by this act. . . ." Protection orders are no longer limited to support proceedings. Also, as a result of these changes, both divisions of the domestic relations court in New York City, are able to issue such orders.

Sections 45-a of the Children's Court Act and 56-b of the Domestic Relations Court Act are both new. They provide that where a protection order has been granted the court clerk may issue a certificate which recites that fact and which sets forth the provisions of the order. The presentation of this certificate to a peace officer constitutes his authority to arrest a person charged with violating the order. Section 126 of the

Domestic Relations Court Act is substantially to the same effect, but it is limited to protection orders issued in support proceedings by the family court in New York City.

The above changes took effect on April 12, 1960.

The Social Welfare Law has been amended in order to permit New York welfare officials to take greater advantages of out of state facilities for foster care.

Formerly, section 374(3) of the Social Welfare Law prohibited the boarding of a child for foster care with a family not residing in New York State. However, it allowed such placement of a child for the purpose of adoption. That section has now been amended to permit duly authorized public welfare officials to place children for foster care with families not residing within the state of New York. However, an agreement must be reached between the welfare officials of New York and the other two states which provides for the supervision of the family and the child. This change should satisfy the wishes of New York City welfare officials for more facilities, and at the same time should provide sufficient protection for the welfare of the child. This amendment took effect on April 21, 1960.

E. G. L.

FALSE ARREST—SHOPLIFTERS—DEFENSE OF LAWFUL DETENTION—*General Business Law—Sections 217 and 218—New.*

These sections now provide a defense in any action for false imprisonment, defamation, or other similar tort, commenced by any person as a result of his having been detained on or in the vicinity of a mercantile establishment in order to ascertain the ownership of merchandise found on his person. The defense is available if there were reasonable grounds to believe that the person detained was committing or attempting to commit a larceny. Reasonable grounds shall include, but shall not be limited to, knowledge that a person has concealed possession of unpurchased merchandise. The person must be detained in a reasonable manner and for a reasonable time, *i.e.,* the time necessary for the person detained to make a statement and for the merchant to check records relative to the ownership of the merchandise in question.

Prior to this legislation, a merchant who had good reason to believe he had caught a customer in the act of stealing was placed in a difficult position. The merchant had either to permit the supposed wrongdoer to leave his store unquestioned and perhaps escape, or run the risk of being liable in an action for false imprisonment or false arrest. A merchant had no legal justification in detaining a customer or causing such person to be arrested if that person had not in fact committed a crime. The fact that there was probable cause to believe a crime had been committed, or that the merchant acted in good faith was previously no defense to him. *Stevens v. O'Neill*, 51 App. Div. 364, 64 N.Y. Supp. 663 (1900). Under the new statute, however, the merchant now has a defense. This amendment became effective on June 1, 1960.

R. M. L.

FOREIGN FIDUCIARIES—PAYMENT—*Personal Property Law, Section 425—New.*

This new section provides that any person, firm, or fiduciary, within this state, having possession or control of any personal property to which a foreign fiduciary is entitled, may pay or deliver it over to him without a court order. The receipt given by the foreign fiduciary constitutes a valid and sufficient release and discharge of the party making the payment or delivery. The provisions of this section do not apply in three situations: (1) where the party making the payment has received written notice of the appointment of an original or ancillary representative in New York; (2) where the party making the payment has received written notice of the existence of creditors in New York; and (3) where a legacy or distributive share of a decedent's estate is involved and the party making the payment has reason to believe that the foreign fiduciary or the person whom he represents would not have the benefit, use, or control of the legacy or distributive share.

This section will give protection to persons, firms, and fiduciaries in New York who deliver over property to foreign guardians of infants, committees of incompetents and executors or administrators. Ancillary proceedings will not be required in this state to effect such a delivery. In many respects this act merely codifies existing case law. *Schluter v. Bowery Sav. Bank*, 117 N.Y. 125, 22 N.E. 572 (1889). This act took effect on April 25, 1960.

E. G. L.

MUNICIPAL CORPORATIONS—TRANSFER OF SIDEWALK LIABILITY TO ABUTTING OWNERS—*City Home Rule Law—Section 11-1—amended.*

Chapter 1080 of the Laws of 1960, amending section 11(1) of the City Home Rule Law, provides that no city shall have the power to adopt local laws transferring its liability for failure to maintain its sidewalks and gutters in a reasonably safe condition. This legislation was prompted by a bill pending before the council of the city of New York which would have transferred the city's tort liability for failure to maintain its sidewalks to the abutting property owners. The object of the amendment was to prevent the city of New York from exercising its power because of the increased expense and burden which would be shifted to property owners.

A possible consequence of this amendment may be to prevent cities from passing a statute making the abutting property owner liable for the repair and maintenance of sidewalks adjoining his property—a course of action the courts have upheld. Prior to this legislation, cities could create a statutory obligation upon abutting property owners to repair and keep safe the sidewalks adjoining their property, and in the event they failed to do so, the city could repair them and charge the property owner with the cost of repair. *City of Rochester v. Campbell*, 123 N.Y. 405, 25 N.E. 937, 8 N.Y. Supp. 352 (1890). Where prior statutes specifically made the abutting property owner liable for injuries sustained by pedestrians through his failure to make repairs as required by statute, liability against the property owner resulted in favor of the one injured. *Willis v. Parker*, 225 N.Y. 159, 121 N.E. 810, 159 N.Y. Supp. 676 (1919). This amendment took effect on April 30, 1960.

R. M. L.

SALES—CHATTEL MORTGAGES—CONDITIONAL SALES—FILING—REFILING—REMOVAL OF RESIDENCE—RESIDENCE—*Personal Property Law, Sections 71, 73, 74, 75—amended, Section 81-b—New; Lien Law, Sections 230, 232-a, 235—amended—Section 239–1—New.*

The requirements for filing and refiling of chattel mortgages and conditional sales contracts have been substantially changed by chapter 1004 of the Laws of 1960. The objective of this legislation is to achieve greater conformity between the rules regulating these two security interests.

Section 71 of the Personal Property Law and section 235 of the Lien Law previously provided that a conditional seller or chattel mortgagee could, under certain conditions, extend the validity of his security interest as to third parties for successive periods of one year after the original filing term had expired. Both sections have been amended to make the refiling effective for three years. In addition to reducing the inconvenience and burden of annual refiling, this change also lessens the risk of unintentional failure to refile on time and a consequent subordination of the security interest to the rights of a third party.

Sections 73, 74, and 75 of the Personal Property Law deal with the situation in which a conditional vendee removes the goods into a district in which the contract is not filed. Section 73 allows the seller to retake the goods unless the buyer gives him notice within ten days of the removal. If such notice is given, section 74 provides that the seller must file the contract in the district to which the goods have been removed within ten days after he receives the notice. If the vendor fails to so file, lien creditors of the buyer and subsequent purchasers of the chattel take priority over his interest. Section 75 makes the removal of the goods by the buyer a crime if he does not give the required notice.

The 1960 amending act has brought within the scope of these sections the situation where a buyer removes his *place of residence* from a district in which the contract is filed into one in which it is not. The duties of notice and refiling imposed by sections 73 and 74, where the goods are removed, now also apply where the buyer changes his residence. The buyer must give notice; if it is properly given, the seller, to protect his security interest, must file in the district where the new residence is located. Failure of the buyer to give notice is a crime.

To understand fully the effect of the amendments to sections 73, 74, and 75, the provisions of the Uniform Conditional Sales Act and the New York Personal Property Law relating to the initial filing of a conditional sales contract must be inspected. The Uniform Act, which in this respect was not adopted in New York State, provides in section 6 that the contract is to be initially filed in the city in which the goods are first kept for use by the buyer. Section 66 of the Personal Property Law, on the other hand, states that the contract is to be initially filed in the city in which the buyer resides at the time the contract was executed. Where the buyer removes the goods to a district in which the contract is not filed, the Uniform Act (section 14) provides and the Personal Property Law (section 74) provided that the seller had to file in the district to which the goods were removed if the buyer gave the required notice.

The former New York provisions for filing and refiling were criticized as being inconsistent on the grounds that if the basis for initial filing is to be the residence of the buyer, as it is in New York, the basis for any refiling ought to be the removal of the buyer's residence and not removal of the goods as New York provides. "It is only in the cases where the recording act makes the district where the goods are located the district of record, that removal of the goods to a new district should require a new record." 2-a U.L.A. 133 (1924). The reason why the Uniform Act provides that initial filing must be made in the city in which the goods are first kept for use and provides that refiling must be accomplished if the goods are removed into a new filing district is evident from the following statement:

> Unless there is a record of the conditional sales contract in the place in which the goods are located, the public is apt to be defrauded. Innocent buyers and chattel mortgagees will naturally examine only the records of the city or county in which the goods are located. They are not apt to know where the goods were originally delivered or where the possessor of them lived, when he bought them. 2 U.L.A. 22 (1922).

Removal of the buyer's residence was not made the basis of initial filing and refiling in the Uniform Act because, as is stated in the commissioner's notes, "He [the seller] will naturally learn in many cases of such removal, because he will be collecting the part payments and will be looking for the buyer." 2 U.L.A. 22 (1922). The New York position has been attacked on two grounds. First, the general public is better protected if initial filing is made where the goods are first kept for use. Second, assuming there is some merit in requiring initial filing to be made in the city where the buyer resides, it is inconsistent to provide for a refiling only when the buyer removes the goods.

To determine whether this criticism was justified and whether the new amendment is an improvement on the former New York position, the effect of the Uniform Act and the prior New York Personal Property Law must be compared. Whenever the buyer's residence and the goods exist in separate filing districts at the time the conditional sales contract is executed, only three basic situations can subsequently arise.

1. The goods always remain where they were, but the buyer changes his residence.

2. The goods are removed into a new filing district, but the buyer's residence remains the same.

3. Both the goods and the buyer's residence are removed into a new and separate filing district.

As was noted above, the Uniform Act provides that initial filing be made where the goods are first kept for use and refiling is required if the goods are moved into a new filing district. Section 66 of the New York Personal Property Law states that initial filing is to be made where the buyer resides. Section 74, before it was amended, required that refiling be made only if the goods were moved to a new filing district. Looking at the three sets of circumstances in the light of the above provisions and from the viewpoint of the protection afforded the public by the two acts, it is evident that each has a distinct effect on the ability of third parties to determine whether goods apparently "owned" by the vendee, are subject to any security interest.

In the first situation, under New York law, the public would find the contract filed in the city where the buyer resided at the time the contract was executed. It would not appear in the city where the goods were located or in the city to which the buyer moved his residence. If the Uniform Act had been adopted in its entirety by New York, the contract would have been where the goods were located, but not in the cities where the vendee originally or subsequently resided.

In the second situation, according to the New York Personal Property Law, the contract would be filed in the city to which the goods had been moved and the city where the buyer resided but not where the goods were originally kept for use. The Uniform Act requires the contract to be filed in the city in which the goods were originally kept for use and the city to which they have been removed but not in the community where the vendee resided.

In the third situation, New York gives third parties the opportunity of discovering the conditional sales contract in the city where the buyer originally resided and the city to which the goods have been moved. They will not find it, however, in the city where the goods were originally kept for use, or the city in which the vendee's new residence is located. Under the Uniform Act the contract is filed in the city in which the goods were originally kept for use and the city to which they have been removed, but it is not filed in the city of the buyer's original or subsequent residence.

As was previously mentioned, these conclusions, as far as New York law is concerned, were arrived at by applying sections 66 and 74 of the Personal Property Law to the three situations. Section 66 has not been changed and it still requires a conditional sales contract to be initially filed in the city where the buyer resides at the time the contract was executed. Section 74 has been amended to bring within its provisions the removal of the vendee's residence. The language of the amended section 74 creates a new problem. It reads in part, where "the goods or his residence are removed by a buyer from a filing district in this state *in which a contract or a copy thereof is filed. . . .*" [Emphasis added] to another filing district in which it is not filed, the seller must refile in the new district to protect his security interest. This qualifying language is new. Under the section prior to the amendment the contract had to be refiled whenever the goods were removed into a new district. (see situations (2) and (3) *supra*). No problem is created by this new wording where refiling is based on removal of residence since section 66 still requires the contract to be initially filed where the buyer resides. Thus, any change in his residence must be from a city in which the contract is filed. In situations where the goods and the buyer's residence were located in separate filing districts at the time the contract was executed, the new language of section 74 seems to dispense with the necessity of refiling if the goods are removed into a new filing district.

The following conclusions appear from reading section 66 in light of the above interpretation given to the amended section 74:

1. A conditional sales contract must be initially filed in the city in which the buyer resides at the time the contract is executed.
2. If, at the time the contract is executed, the buyer's residence and the goods are located in the same filing district, a subsequent removal of either will require the seller to refile to protect his security interest.
3. If, at the time the contract is executed, the buyer's residence and the goods are located in separate filing districts, subsequent removal of the vendee's residence, but not a removal of the goods, will require the seller to refile.

As a result of an amendment to section 230 of the Lien Law, the validity of a chattel mortgage as to creditors of the mortgagor and subsequent bona fide purchasers for value is made contingent upon the filing of the mortgage within ten days after its execution. The law had previously required filing within a reasonable time. *Tooker v. Siegel-Cooper Co.*, 194 N.Y. 442, 87 N.E. 773 (1909); *Karst v. Gane*, 136 N.Y. 316, 32 N.E. 1073 (1893). A conditional sales contract must also be filed within ten days of its execution. However, if such a contract is filed late, only purchasers and lien creditors who acquired their interest without notice before the filing are protected. When a chattel mortgage is filed late, all purchasers and creditors without notice who extended credit before filing are protected.

Section 81-b of the Personal Property Law and section 239–1 of the Lien Law are new sections which define the residence of corporations and persons conducting a business under an assumed or partnership name. The residence of a domestic corporation is declared to be the city or town and county which is set forth in its certificate of incorporation as being the location of its office. The city or town and county specified in the statement filed by a foreign corporation in order to obtain a certificate of authority to do business is its residence. For a partnership or a person not doing business under his real name, residence is the address at which the business is being transacted as set forth in the certificate filed under section 440 of the Penal Law.

This amendment will change previous case law requiring the conditional sales contract or mortgage to be filed in the city of residence of each individual partner where a partnership was a buyer or mortgagor. *Ament v. Zaharion,* 206 App. Div. 143, 200 N.Y. Supp. 595 (1923). *Stewart v. Platt,* 101 U.S. 731 (1879). All changes in this article took effect on October 1, 1960.

E. G. L.

TRUSTS—THE NAMING OF A TRUSTEE BY WILL AS A LIFE INSURANCE BENEFICIARY—*Decedent Estate Law—Section 47-f—New.*

This new section provides that life insurance proceeds may be made payable to a trustee who is named as the beneficiary of the policy under a trust established during the insured's lifetime. The corpus of the trust may consist only of the right of the trustee to receive such insurance proceeds. This provision in the statute is in accord with the existing law in New York, since prior to this enactment, the right of a beneficiary to receive the proceeds of a life insurance policy was a satisfactory trust res for purposes of an inter vivos trust. *Hirsh v. Auer*, 146 N.Y. 13, 40 N.E. 397, 29 N.Y. Supp. 917 (1895).

This section also provides that an insured may designate *a trustee to be named by will* as the beneficiary of his life insurance policy. Upon qualification of a trustee, the proceeds are held and disposed of by the trustee under the terms of the will. The proceeds are treated in the same manner as proceeds payable to a named beneficiary for purposes of determining creditor's rights and transfer and estate taxes, and not as proceeds payable to the insured's estate. If no trustee lays claim to the proceeds within eighteen months, or if proof is offered showing there is or will be no trustee, the proceeds are payable to the insured's estate, unless a different agreement was reached between the insured and the insurance company. This provision seems precautionary in nature in that it eliminates the possibility that a life insurance policy which designates a trustee to be named by will as beneficiary will be declared by the courts to be an invalid testamentary disposition. Although there are no decisions in New York on this point, attempts to dispose of life insurance proceeds in this way have been unsuccessful in other jurisdictions. *Frost v. Frost,* 202 Mass. 100, 88 N.E. 446 (1909). This amendment takes effect on January 1, 1961.

R. M. L.

DIGESTS OF CURRENT DECISIONS

ADMINISTRATIVE LAW

Petitioner was employed by the New York City Transit Authority as a ticket seller. After a trial before the Authority, it was found that she had collected fares from passengers and had then directed such passengers to enter onto the station platform by a turnstile that did not register their fares. The petitioner was found guilty of retaining fares and as a result she was dismissed from her employment. Following her dismissal, she brought a proceeding under article 78 of the Civil Practice Act to annul or modify the determination of the Authority. The appellate division, second department, two justices dissenting, confirmed the determination but held the punishment excessive, citing subdivision 5-a of section 1296 of the Civil Practice Act that allows courts to decide whether the administrative body abused its discretion in imposing the punishment. The court then reduced the punishment from dismissal to suspension for six months. The dissenting judges disagreed with the modification of the penalty but not with the determination of guilt. *Held:* The evidence was sufficient to support the findings of guilt. "With some hesitation we conclude that the appellate division's reduction of this penalty was authorized by subdivision 5-a." Upon finding the punishment excessive, the court was authorized under subdivision 5-a to fix a new lower penalty. In the light of subdivision 5-a and under the circumstances of this case the six-month suspension was not illegal, although subdivision 3 of section 75 of the Civil Service Law provides for ". . . suspension without pay for a period not exceeding two months . . . or dismissal from the service. . . ." *Mitthauer v. Patterson,* 8 N.Y.2d 37, 167 N.E.2d 731, 201 N.Y.S.2d 321 (May, 1960).

CONFIDENTIAL COMMUNICATION

Appellant, a lawyer, gave certain information obtained from his client to various New York City commissioners who were investigating illegal parking on the waterfront. Appellant was committed to jail for refusing to reveal the name of his client to the commissioners. Appellant claimed that he was entitled to withhold the name because of the attorney-client privilege. Respondent countered that until it was proved that a client existed, there could be no attorney-client relationship and that the name had to be divulged. *Held:* The client's communication to the attorney was made in the aid of a public purpose to expose wrongdoing, not to conceal wrongdoing, and the client's name deserved and needed protection. In the instant case, there was no reason to doubt that the informant was a client of the appellant, and it was unnecessary to investigate that relationship. The court stated that the only times when an attorney should be forced to identify his client are: (1) in the course of litigation so that each litigant might know the identity of his opponent, and (2) in the case where the attorney's assertion of the privilege is a cover for cooperation in wrongdoing. *Matter of Kaplan,* 8 N.Y.2d 214, 168 N.E.2d 661, 203 N.Y.S.2d 891 (July, 1960).

COPYRIGHTS

Plaintiff, a purchaser of exclusive motion-picture, television, radio and allied rights in two books, brought a suit for a declaratory judgment that he was the sole owner thereof and that defendants had no rights therein. The author who held the recorded copyrights to the two books had allegedly assigned her copyrights to the defendants prior to plaintiff's purchase. However, the plaintiff, who had no knowledge of the alleged assignment to the defendants, was the first party to duly record the assignment. The contract between the author and plaintiff by its terms "assigns" to plaintiff "any and all rights" of the author. Defendants claimed that plaintiff purchased only a *license* to the motion picture and allied rights because the contract between the author and the plaintiff did not contain the term "assignment." Even though the alleged license was first duly recorded, defendants claimed that plaintiff's recordation did not defeat defendants' *assignment* of the copyrights. *Held:* The term "assigns" used in the contract between plaintiff and author was sufficient to constitute an assignment and not merely a license to the rights. 17 U.S.C. 30 (1958) provides that every assignment of a copyright not recorded in the copyright office shall be void as against a subsequent purchaser without notice whose assignment is first duly recorded. The plaintiff was entitled to the declaratory judgment. *Vidor v. Serlin,* 7 N.Y.2d 502, 166 N.E.2d 680, 199 N.Y.S.2d 669 (April, 1960).

CRIMINAL LAW

The county court denied defendant's motion for a writ of error coram nobis. He appealed from this order to the appellate division. Subsequently, defendant filed an application for appeal on the original papers as a poor person, but this application was denied on the ground that the appeal lacked substantial merit. Months later, the original appeal was dismissed for failure to prosecute. Defendant appealed from the order and raised the question whether the appellate division may deny an application for leave to appeal as a poor person on the ground that the appeal lacks substantial merit. *Held:* Defendant was permitted to prosecute his appeal. The right to appeal requires a review of the merits upon appeal and is not satisfied by a mere consideration of those merits upon a submission of affidavits on an application for leave to have the appeal heard on the original papers. The right to appeal is assured to all defendants, rich and poor alike, and this right does not depend upon the existence of meritorious points. Therefore, defendant was not required to show substantial merit before entertaining his appeal. *People v. Borum,* 8 N.Y.2d 177, 168 N.E.2d 527, 203 N.Y.S.2d 84 (July, 1960).

CRIMINAL PROCEDURE

Defendant was convicted of violating state and municipal dwelling laws and sentenced to thirty days in prison. While serving his term of imprisonment, he appealed from the judgment of conviction. After defendant initiated his appeal, he sued out a writ of habeas corpus challenging the jurisdiction of the court. The writ of habeas corpus was sustained and defendant was discharged. His appeal from the judgment of conviction, taken prior to the initiation of the habeas corpus proceeding, resulted in a judgment of affirmance. The defendant again appealed. *Held:* Until it has been set aside or reversed, the order sustaining the writ of habeas corpus constitutes a final and binding determination that the judgment of conviction was void. Therefore, the appeal was rendered strictly academic. Although the challenge to the jurisdiction of the court could have been raised on appeal, and although such a procedure might have been a more orderly and regular method of procedure, the right to invoke habeas corpus is so primary and fundamental that it must take precedence over procedural orderliness and regularity. *People v. Schildhaus,* 8 N.Y.2d 33, 167 N.E.2d 640, 201 N.Y.S.2d 97 (May, 1960).

DUE PROCESS

The defendants' trial lasted 14 months, and on the basis of the length of this trial they contended that there was a violation of the due process clause of the federal constitution. *Held:* There is no violation of the due process clause solely because of the length of a jury trial. While much of the prosecution's evidence was cumulative in effect, the defense made no objection to its being received. In fact, the defendants were responsible in part for the length of the trial by extending their cross-examination of witnesses. The test to be applied in determining whether there has been a violation of the due process clause is whether, under all of the circumstances, the defendants were accorded a fair trial. *People v. Clemente,* 8 N.Y.2d 1, 167 N.E.2d 327, 200 N.Y.S.2d 625 (April, 1960).

EMINENT DOMAIN

Petitioner, Federal Power Commission, claimed that certain lands owned by respondent Indians could be taken for a hydroelectric power project, upon payment of just compensation, by the Power Authority of the state of New York under a license issued to it by petitioner. Respondent claimed that the lands could not be so taken because they were a part of a "reservation" as defined in section 3(2) and as used in section 4(e) of the Federal Power Act, 49 Stat. 838, 16 U.S.C. §§ 796(2), 797(e) (1935). Under the Act "reservations" could not be taken for a power project without petitioner first finding that the license given the Power Authority would not interfere or be inconsistent with the purpose for which such reservation was created or acquired. *Held:* The disputed lands were owned by the Tuscarora Indian Nation, and no interest in them was owned by the United States. Thus such lands were not a "reservation." Therefore, it was not necessary for the Commission to find that the license given to the Power Authority would not interfere or be inconsistent with the purpose for which such reservation was created or acquired before the lands could be taken. Moreover, any lands owned by Indians could be condemned by the licensee under the provisions and eminent domain power of section 21 of the Federal Power Act. The Act gives every indication that Congress intended to include lands owned or occupied by *any* person or persons, when needed for a licensed project, upon payment of just compensation. In addition, the provisions of 4 Stat. 730, 25 U.S.C. 177 (1834), which prohibit the taking of any Indian lands without the express and specific consent of Congress, does not apply to the United States itself nor to its licensees under the Federal Power Act. *Federal Power Comm'n. v. Tuscarora Indian Nation,* 362 U.S. 99 (March, 1960).

EVIDENCE

Jacob Miller worked as a piano finisher from 1928 until 1950 when he died from leukemia. His widow filed a claim for death benefits under the Workmen's Compensation Act on the theory that her husband's death resulted from an occupational disease. It was claimed that the leukemia was caused by exposure to benzene which was contained in varnish removers used by all employers for whom the decedent had worked. An industrial hygiene physician testified that there was no known cause of leukemia, and that his investigation disclosed no causal relation between substances used by the employers and the decedent's leukemia. Decedent's personal physician declined to express an opinion that the leukemia resulted from his employment. A pathologist stated that the type of leukemia involved took from a few days to 23 years to produce death and that he had no idea what factors prolong or shorten its duration. Another doctor testified that he believed that a person exposed to benzene may develop the kind of leukemia involved here. He stated that the incidence of leukemia "is quite high in patients who have been exposed to benzol. . . . [I]t is possible that this man's leukemia resulted from his alleged exposure to inhalation of benzol or benzene." The referee disallowed the claim for failure to show a causal relation. The Board reversed upon finding such a relation. *Held:* The testimony here does not establish causation. Words such as "could produce," "it is possible," or similar expressions interjected by an expert witness do not destroy the probative force of the testimony if the opinion evidence is "fortified by detailed explanation and other facts in the record which add to its reasonableness and probable correctness." Such expressions in the evidence have no probative force because explanatory testimony failed to support them. No expert witness testified that exposure to benzene was any more than a possible cause of leukemia. An assumption that the incidence of leukemia was "quite high" in patients who have been exposed to benzene is without significance unless statistical data is brought forth to show how high it is. "Nevertheless, there must be some evidence of a basis for the opinion and the acceptance in one case of the possible as meaning reasonable medical certainty does not justify treating every possibility as though it were enough to establish the facts sought to be proved. In the training of a scientist anything conceivable is a possibility." *Miller v. National Cabinet Co.*, 8 N.Y.2d 277, 168 N.E.2d 811, 204 N.Y.S.2d 129 (July, 1960).

EXAMINATIONS BEFORE TRIAL

Plaintiff had been examined before trial. A transcript of the examination and a letter requesting that any changes be appended were sent to plaintiff's attorney. Upon receipt of the executed transcript, defendant discovered that several alterations or additions had been made in the body of the transcript. Defendant moved at special term for an order dismissing the complaint or granting appropriate relief on the ground that the transcript was improperly executed in that it must set forth the original testimony with any changes shown at the end of the transcript with the reasons therefor. The motion was denied at special term. *Held:* The defendant's motion should be granted to the extent that plaintiff should be directed to specify the reasons for the changes in the transcript. The right to make corrections or changes in the testimony is recognized by decisional law and is implicit in section 302 of the Civil Practice Act. The proper manner of making such changes is to indicate at the foot of the testimony, the answers which are incorrect, the reason therefor, the corrected answer, and any other explanation of the previous answer. This precise procedure should be followed. *Skeaney v. Silver Beach Realty Corp.*, 10 App. Div. 2d 537, 201 N.Y.S.2d 163 (1st Dep't, June, 1960).

INSURANCE

The Federal Trade Commission, as petitioner, sought to enforce a cease and desist order which it had issued to respondent prohibiting it from employing certain statements in its interstate mail order business. Respondent was engaged in soliciting business by mailing circular letters to prospective buyers who had been recommended by its existing policyholders. The respondent insurance company claimed that the order was violative of the McCarran-Ferguson Act which provides for state regulation of the insurance business. The act also provides that the Federal Trade Commission Act is not applicable to the insurance business in the phases in which it is regulated by state law. *Held:* The McCarran-Ferguson Act does not prevent the FTC from regulating an insurance company's interstate mail order business. Congress intended state regulation to displace federal legislation only in the state in which deception is practiced and has its impact. Congress did not provide for the deceptive insurance practices in one state to be regulated by the laws of a sister state. *Federal Trade Comm'n v. Travelers Health Ass'n,* 362 U.S. 293 (March, 1960).

LIBEL

Plaintiff wrote and published *Clevenger's Annual Practice of New York* and sold this work and its copyright to defendant. Plaintiff did not edit the 1959 edition, but defendant published it with the following title page: *Clevenger's Annual Practice of New York–1959–Annually Revised.* Plaintiff contended that this title page induced readers to believe that he revised the 1959 edition and thus all of the mistakes and errors contained therein were attributed to him. Plaintiff sued for libel. Defendant contended that the title page only indicated that plaintiff was the author of the original text and did not infer that he made the revisions. *Held:* To publish in the name of a well-known author any literary work, the authorship of which would tend to injure that author's position in the world of letters, may be a libel. The court stated that this doctrine has deep roots in the English common law. Here a jury could have reasonably found that the wording and arrangement of the title page in question would tend to make a reader believe that the revision work had been done by plaintiff. *Clevenger v. Baker Voorhis & Co.,* 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812 (July, 1960).

NEGLIGENCE

The infant plaintiff, while participating in a game in the gymnasium at summer school, was allegedly injured due to defendants' negligence. Plaintiff sought to prove that defendants furnished neither proper supervision nor proper equipment. A temporary science teacher and an assistant who held no teacher's license, both of whom usually supervised the children, had allegedly walked to the other end of the gymnasium prior to the time of the accident. Upon defendants' motion, plaintiff was nonsuited upon the record before the court, which consisted of the pleadings, opening statement, oral motions and arguments. Plaintiff appealed. *Held:* The facts alleged in the complaint and the opening statement were not such as to preclude any possibility of recovery, and the dismissal after opening to the jury was premature. Such a dismissal or nonsuit could not have been granted unless: (1) the complaint did not state a cause of action; (2) the cause of action stated was conclusively defeated by something interposed by way of defense and clearly admitted as a fact; or (3) the plaintiff's counsel, in his opening statement, so completely ruined his case that the court was justified in granting a nonsuit. The court further held that no complaint should be dismissed on the opening statement of counsel unless it appears beyond a doubt that no question of fact is involved.

Here there were questions of fact to be litigated. There was a possibility that plaintiff would be able to establish a prima facie case by proving that lack of proper supervision and failure to furnish proper equipment were the proximate causation of infant plaintiff's injury. *Rivera v. Board of Education,* 11 App. Div. 2d 7, 201 N.Y.S.2d 372 (1st Dep't, June, 1960).

NEGLIGENCE

Plaintiffs brought an action for property damage due to water leakage in a building owned by defendant corporation. The managing agents of the building, who were officers of the corporation, were made individual defendants in the suit. The individual defendants claimed that they could not be held liable for their acts of nonfeasance in failing to repair the defective plumbing system in the building. They claimed that, as agents, they had not undertaken the power, authority or responsibility to make repairs to the building. *Held:* Individual defendants' motion for summary judgment dismissing the complaint as to them should be granted. While acting as agents of the corporate owner, the individual defendants would have been liable for misfeasance only. Here rents were paid to the corporate owner for space in the building, and repairs to the building were paid for from these rent funds. Therefore, it was the corporation's duty to make repairs. If the individual defendants had the power, authority and responsibility to make repairs as the corporation's agents, then the agents' liability for negligence would embrace nonfeasance as well as misfeasance. However, in this case, the individual defendants were not delegated exclusive and complete control of the management and operation of the building, and thus were not liable for nonfeasance. *Michaels v. Lispenard Holding Corp.,* 11 App. Div. 2d 12, 201 N.Y.S.2d 611 (1st Dep't, June, 1960).

QUANTUM MERUIT

Claimant lived with the decedent as his wife, but in fact she was not married to him. She maintained a home for him and was known in the community as his wife. They operated a tavern together, and it was not disputed that claimant spent most of her time and effort in helping decedent to operate this business. She made a claim against the estate for work, labor, and services on the theory that she was employed at a weekly wage which was never paid. Claimant's bill of particulars stated that the decedent had orally promised to pay her the fair value of her services. Witnesses testified to admissions by decedent that claimant would be paid. The surrogate held the claim to be barred because of the meretricious relationship which existed. The appellate division, however, found that she was working for hire and that the services to be compensated were severable from any personal relationship. *Held:* The existence of a meretricious relationship will not prevent a recovery by claimant if there was an express agreement that she be paid, so long as she was not being paid to be decedent's mistress. The rule is that clear and convincing proof is required to support claims filed against a decedent's estate. The claimant performed services which normally would be performed by a wife whose husband owned a grill, and not by a woman working for hire. She worked long hours; no entries in the books showed the accrual of wages; she never demanded to be paid. Therefore, she could not recover on a quantum meruit theory. *In re Gorden*, 8 N.Y.2d 71, 168 N.E.2d 239, 202 N.Y.S.2d 1 (May, 1960).

REAL PROPERTY

Appellant brought this action to recover partial payment of the purchase price, which she had made to respondent on a contract to purchase real property. The contract provided that respondent should convey the fee simple of the property free from all incumbrances except those stated therein, and that respondent was to provide a title such as *any* recognized title company associated with the New York Board of Title Underwriters would approve and insure. When appellant purchaser applied to a title company for title insurance, she was informed by the company that it would not insure title to a certain portion of the land and that it would only insure title to the balance subject to certain covenants and restrictions. *Held:* A provision in a contract that the seller provide a title such as *any* recognized title company would approve and insure means that the purchaser, when refused by any one company he chooses, is thereby entitled to consider the contract as breached. Appellant was entitled to summary judgment to recover the payment that she had made on the contract. Respondent had failed to fulfil a condition precedent to his right to demand performance of the contract from appellant, *i.e.*, he had failed to furnish a title which any one title company would approve and insure without exceptions other than those included in the contract. Moreover, respondent was not required to prove that no title company associated with the New York Board of Title Underwriters would insure the title without such exceptions. It was sufficient that the one company to which she had applied refused to extend the coverage contemplated by the contract. Since the respondent had failed to fulfil a condition precedent imposed by the contract, he had no defense to a motion for summary judgment. *Kopp v. Barnes,* 10 App. Div. 2d 532, 204 N.Y.S.2d 860 (2d Dep't, May, 1960).

REAL PROPERTY

Plaintiffs-respondents owned residential property abutting that of defendant-appellant and brought an action to extinguish defendant's claim of an easement of ingress and egress over a lane separating the two lots, and for removal of encumbrances erected by defendant. Originally the lane, later acquired by plaintiffs by tax deed, was the only possible avenue to a public street from the defendant's property. Subsequently, a public highway bordering the land in question was erected, thus making unnecessary the use of the lane as a means of ingress and egress to the public street. *Held*: The easement was created by implied grant, and may be extinguished only by abandonment, conveyance, condemnation, or adverse possession. It matters not whether the grant was express or implied, or whether the easement might originally have been created out of necessity. The fact that the necessity ceases to exist is not sufficient to extinguish the easement. Neither can nonuser alone, no matter how long continued, extinguish an easement created by grant. To establish abandonment there must be proved not only an intention to abandon but also some overt act or failure to act which implies that the owner of the easement neither claims nor retains any interest in it. *Gerbig v. Zumpano*, 7 N.Y.2d 327, 165 N.E.2d 178, 197 N.Y.S.2d 161 (Jan., 1960).

RES JUDICATA

Plaintiff was injured while a passenger in an automobile owned by a husband and driven by his wife, both of whom were defendants in the present action. Plaintiff and the driver were employed as nurses by a third defendant, the county, and at the time of the injury were en route to pay tuition fees for a nursing course which they were planning to take. In this action by the plaintiff to recover damages, all three defendants interposed answers containing affirmative defenses that the plaintiff and the defendant were in the course of their employment at the time this accident occurred. Plaintiff's motion to strike out these defenses as sham was granted on the following grounds: that a regularly scheduled workmen's compensation hearing had been held; that the county had been adequately represented at the hearing by counsel; and that the plaintiff's claim had been disallowed at the hearing by the referee. *Held:* The order granting the plaintiff's motion to strike out the affirmative defense alleged by the defendant county should be sustained, because the county had its day in court at the compensation hearing. However, the order was modified to reverse that part which struck out the affirmative defenses of the driver and the owner, since no notice of the compensation hearing had been given to them. Consequently, they had no opportunity to participate in the hearing, and the doctrine of res judicata was not a bar to their defenses. *Pfeiffer v. McCall,* 11 App. Div. 2d 95, 202 N.Y.S.2d 109 (4th Dep't, July, 1960).

RES JUDICATA

Plaintiff was injured due to defendant's alleged negligence when his automobile collided at an intersection with defendant's automobile.

Defendant pleaded res judicata relying upon a judgment in a prior action in which an infant who was a passenger in defendant's car recovered damages against both plaintiff and defendant in this action. *Held:* Defendant's motion for summary judgment should be denied. Since the operators of the two vehicles were not adversaries in the prior suit, but instead were co-defendants, the judgment in the former action did not settle the question as to liability of the co-defendants to each other. Therefore, it was error to hold that plaintiff was precluded from litigating the issue of negligence between plaintiff and defendant by the judgment obtained by a passenger of one of the vehicles in another action. *Freidman v. Salvati,* 11 App. Div. 2d 104, 201 N.Y.S.2d 709 (1st Dep't, June, 1960).

STATUTE OF LIMITATIONS

Petitioners, representatives of deceased shareholders of a dissolved corporation, sought to compel the surviving directors to account pursuant to section 106 of the Stock Corporation Law. Respondents claimed that the proceedings had been brought by or on behalf of a corporation and therefore were barred by the six-year period of limitation. *Held:* While directors of a "going" corporation are only under a duty to account during a six-year period, it does not necessarily follow that the directors of a dissolved corporation must of necessity be governed by the same period of limitation. Directors of a dissolved corporation become trustees of a trust fund created by operation of law for the benefit of the creditors of the corporation and its stockholders. This accounting proceeding brought pursuant to section 106 was an equitable proceeding, and the right to such an accounting was given to the individual stockholders by the section. It was not a corporate action, and therefore the ten-year period of limitation applied. *Matter of Baldwin Trading Corp.,* 8 N.Y.2d 144, 168 N.E.2d 383, 202 N.Y.S.2d 312 (June, 1960).

David Josiah Brewer

MR. JUSTICE BREWER: PERSPECTIVE OF A CENTURY

Francis Bergan *

I

On June 1, 1904, forty-six years after his graduation, Justice David Josiah Brewer of the Supreme Court of the United States returned to Albany Law School to make the commencement address. The occasion was memorable. Chief Judge Alton B. Parker of the Court of Appeals and a majority of his associates, Judges Vann, Bartlett, Martin and Werner were on the platform of Odd Fellows' Hall. Justice Herrick of the New York Supreme Court was present. J. Newton Fiero, eminent as a dean and teacher of law, led the faculty of the law school. Chancellor Raymond of the University conferred the degrees. The forty-six years since Justice Brewer had himself been a graduate had been, for him, years of growing professional ascendancy; and in the graduating class of 1904 were men who were to become in their generation leaders of the bar and distinguished in public affairs.[1]

The address opened in light vein: a story or two. Brewer was a delightful raconteur.[2] It continued, as is the custom in such efforts, into a serious probing of some current legal and public problems. The issues seem now curiously lifeless. He alluded to growth of corporations: "Between the individual and the government has come the corporation. . . ."[3] He was concerned with special influences in Congress and the lawyer's place in them: "Washington is the great lobby camp of the world. . . . As an advocate before departments or legislative bodies or their committees he stands upon the same plane as the lawyer in the courtroom."[4] He recognized the value of political activity in the public interest but placed sharp boundaries on partisanship. Oddly enough, two of his judicial listeners that night were soon to quit the judge's place to contend, each unsuccessfully, for high office: Chief Judge Parker against Theodore Roosevelt for the presidency; and Justice Herrick against Frank W. Higgins for governor of New York.

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* Presiding Justice, Appellate Division of the Supreme Court of the State of New York, Third Department.

[1] At least nine are still living. Del B. Salmon of Schenectady, a member of the Class of 1904, gives the following names: Stephen E. Chaffee, Sunnyside, Washington; Robley D. Cramer, Minneapolis, Minnesota; Milton E. DeVoe, Hollywood, Florida; Nicholas DeVoe, Mineola, New York; Charles E. Palmer, Schenectady, New York; Del B. Salmon, Schenectady, New York; Peter G. Smith, Webster, New York; Herbert P. Thomas, Rochester, New York; Robert N. Wilson, Salem, New York. As far as the records of the Albany Law School indicate, the following members of that class are also still living: Niram DeVoe, Jamaica, New York; George B. Odwell, Downsville, New York; J. Craig Roberts, Buffalo, New York.

[2] CARSON, THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY 540 (1891).

[3] Brewer, *Address Delivered at Commencement of Albany Law School, June First 1904*, PAMPHLET NO. 239, LAW PAMPHLETS, N.Y. State Law Library, p. 8.

[4] *Id.* at 9.

The address ended, as commencement addresses so often do, in sentiment: "[F]orty-six years ago I stood where you stand"; [5] and on the wings of optimism and inspiration. Each era has its own favored tempo and form of art; and the commencement address is an art form sensitively attuned to the feeling of the day. There can be no doubt that the address was harmonious with the time and place and that it was well received by the dean and faculty, the graduates, and their distinguished guests. For Justice Brewer was a skilled public speaker. After his death in 1910 the editors of the *Virginia Law Register* recalled with pleasure an address he had made in 1906 before the Virginia Bar Association. They noted:

> His address . . . will long be remembered not only for its strength and interest, but for the pleasant personality of the speaker. He impressed himself upon those who met him as a straightforward, plain thinking and fearlessly expressing man. . . . More than any other judge of the great tribunal of which he was a member he mingled with the people and addressed his countrymen from the platform upon matters concerning the general welfare. He did not hesitate to express vigorous opinion upon all the great questions of the day and with vigorous rhetoric, he lashed the abuses of legal processes and the chicanery of lawyers.[6]

It was just this practice, however, which troubled Justice Holmes, for he confided in a letter to Sir Frederick Pollock after Brewer's death:

> He was a very pleasant man in private, but he had the itch for public speaking and writing and made me shudder many times. I had to remind myself that one should not allow taste to blind one to great qualities, as it is apt to. I have heard him speak in public with a curious bitterness about some of the decisions of his brethren that he disagreed with.[7]

But although Holmes differed with him on certain matters of taste, he did not dissent from the view quite generally shared by Brewer's contemporaries that he was in possession of superb professional equipment. Holmes, in the unrestrained confidence of the letters to Pollock, was not likely to use the term "great qualities" casually in referring to his judicial associates; and, indeed, a perusal of the correspondence makes it clear that he felt otherwise as to some of them and said so.

Shortly after Brewer's appointment to the Supreme Court, Carson published his history of the Court and noted the judicial reputation Brewer brought with him from Kansas after more than twenty-five years' service on the state and federal benches.[8] His ability was recognized by Chief Justice Horton of the Kansas Supreme Court on which Brewer had served. The Chief Justice wrote: "He possesses quick perceptive faculties, and works with great facility and ease. He has discharged all the duties of his various judicial positions with untiring industry, acknowledged ability, and recognized impartiality. He has great executive ability, and is very energetic in the despatch of business." [9] In May, 1910, the editors of *Law Notes,* reviewing Brewer's career and expressing, too, a contemporary evaluation, suggested that his judicial expressions on the Supreme Court demonstrated him to be "a profound and clear thinker." [10]

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[5] *Id.* at 17.

[6] 16 VA. L. REG. 65 (1910).

[7] 1 HOLMES-POLLOCK LETTERS 160 (Howe ed. 1941).

[8] CARSON, *op. cit. supra* note 2, at 540.

[9] Horton, *David Josiah Brewer,* 2 GREEN BAG 1, 2 (1890).

Brewer sprang from a truly extraordinary family. His maternal grandfather, the Reverend David Dudley Field, was a distinguished New England clergyman.[11] One of Brewer's uncles laid the Atlantic cable; another wrote the Field Code of Civil Procedure; another sat on the United States Supreme Court for thirty-four years; another was a well-known editor. Great personal talent flashes brilliantly in the world and is gone; it is rare that it repeats itself in a family, and rarer still that it repeats itself with diversification and high power in the same generation of the same family. In this country the Adams family is accepted as a unique phenomenon. For almost two centuries it lighted the American scene and exerted power and leadership. From John Adams, born in 1735, through John Quincy, Charles Francis, and Henry, the American intellectual par excellence, who died in 1918, the influence of the direct father-to-son line of that family in America was continuous. Other examples are as rare in America as they are elsewhere. The Field family, however, had displayed remarkable abilities for two generations by the time Brewer was born. Brewer's mother was Emilia Field, and the Fields of her generation defied the laws of probability.

Brewer's eldest maternal uncle, David Dudley Field, born in 1805, son of the clergyman of that name, was commissioned by the New York legislature in 1847 to prepare a code of civil procedure designed to obliterate troublesome distinctions in forms of actions and the procedural differences between law and equity. The code of civil procedure prepared by Field was not only enacted in New York in 1848 but within twenty-five years was adopted in twenty-three other states. It became the basis of the reformed procedure established in England by the Judicature Act of 1873 and in the federal courts of the United States by the Federal Rules of Civil Procedure of 1938. Field was also responsible in large measure for preparation of a code of criminal procedure, enacted in 1881, and for a penal code, which was finally enacted in 1882. Two other codes that he prepared, a political code and a civil code, were never enacted in New York though influential in other states. His work has survived, through many mutations, in its essential structure and procedural theory in the present Civil Practice Act and, indeed, in the current proposals for revision. The superb full-length portrait of David Dudley Field that dominates the lawyers' room in the Court of Appeals at Albany suggests the intellectual power and personal force that could carry to fruition the most significant procedural reforms of the last century.

Another of Brewer's uncles, Stephen Johnson Field, born in 1816, moved to California after starting to practice law in David Dudley's office in New York City. He took a notable part in the codification of California law, became chief justice of that state in 1859, and was appointed by President

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[10] 14 LAW NOTES 26, 27 (1910).

[11] SCOTT, DISTINGUISHED AMERICAN LAWYERS 75 (1891); SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW 9–12 (1930).

Lincoln to the United States Supreme Court in 1863. The singular fortunes of the family were so disposed that his nephew, Brewer, was to serve with him as an associate in the Court from 1890 to 1899.

In sheer pertinacity and unshakable fidelity to an idea that repeated failure could not kill, a third uncle, Cyrus West Field, born in 1819, was by far the most extraordinary and wrote largest on the page of general history. Cyrus was a paper manufacturer and merchant. In 1854 he conceived the then quite visionary project of a trans-Atlantic cable. This was only ten years after Morse's first successful telegraphic message from Washington to Baltimore. The cable project was marked by repeated difficulty and failure. Cyrus Field organized companies in the United States and England; and five attempts were made in 1857-58 before the cable worked and the first messages were sent in August, 1858. Its failure after only three weeks of operation must have been a bitter personal experience. Field continued for eight years, however, organizing new companies, getting together fresh capital, meeting technical difficulties, until in 1866 success came at last. Another of Brewer's uncles, Henry Martyn Field, born in 1822, became a noted editor and, like his father, a clergyman. He was the author of many books.

Into this family, the range of whose talents could encompass the projection and laying of a great oceanic cable, the development of a civil code so good as to win many sovereign adopters, the occupation of great judicial office, and the writing and editing of books, David Josiah Brewer was born June 20, 1837 in Smyrna, Turkey, where his clergyman father, Josiah, was a missionary. With an assurance it would be instructive to see documented, the note-writer for the *American Law Review* remarked that "his mother was a sister to the Fields, and it is from that source he probably derived his fine intellect." [12] But his father, too, had something more than a routine way of life. A graduate of Yale, he went to Turkey in 1830 as one of the first missionaries for the American board. We are told that he established the first newspaper in Smyrna and was the first to introduce European education into the Turkish Empire.[13] It was while his father was engaged in these significant activities in Asia Minor that Brewer was born in 1837. As Holmes confided to Pollock: "He came of a strong blood." [14]

The year after Brewer's birth his family returned to America and settled in Wethersfield, Connecticut. Brewer's early education followed a traditional New England pattern. After attending Wesleyan University for two years, he went to Yale where he was graduated with honors in 1856. Later that year he went to New York City, where he studied law for a year in the office of David Dudley Field; and then to Albany Law School, which had been established in 1851, where he was graduated with the class of 1858 and was admitted to the New York Bar. But Brewer did not stay, as it might be expected he would, in New York, or return to New England to practice law. He chose to go to Kansas, and in the fall of the year of graduation from law school, he went to reside in Kansas City. Shortly thereafter he made a journey up the Arkansas River and continued on to Pike's Peak and to Denver. He then went back to New England for a visit, but in June, 1859, returned to Kansas to settle in Leavenworth, which became his home until he went to the Supreme Court.[15]

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[12] 24 AM. L. REV. 137, 138 (1890).

[13] FEATHER, SUPREME COURT OF THE UNITED STATES 151 (1900).

[14] 1 HOLMES-POLLOCK LETTERS, *op. cit. supra* note 7, at 160.

Brewer's choice of the West, and particularly of Kansas, to practice his profession suggests some interesting questions. The year that he spent in David Dudley's law office, 1857, was just at the time when Field had been commissioned to prepare major codifications of New York law. It would be normal to expect that a bright young law student, recently graduated from Yale College with high honor, would have been at once harnessed to the work of the code. The eminent place of Field in the New York Bar must have suggested, too, that the quickest way to become a successful lawyer would be to stay with him. But Brewer went to Albany to enter upon the formal study of law; and then he followed the direction that Stephen J. Field had taken out of David Dudley's office: he went west.

The reasons that Stephen went to California are more readily apparent. He spent a year in Europe in 1848 after his admission to the New York Bar, and when he came back in 1849, the adventure of "going to a country comparatively unknown and taking a part in fashioning its institutions, was an attractive subject of contemplation." [16] But Brewer did not go to California. Even though the gold rush of ten years before had subsided by 1859, there are other reasons why he might have gone there. For one, his uncle Stephen had been elected a justice of the California Supreme Court in 1857; and the very year that Brewer went to Kansas, Stephen became the chief justice of California. Perhaps for the very reason that his uncles were distinguished and successful men of "strong blood," Brewer wanted to go on his own. The coincidence strikes one with especial force that in the final turn of the wheel Brewer came from Kansas to the United States Supreme Court to sit as a junior associate justice for almost ten years with his uncle from California. The differences in their ages was not very great, and Stephen, as a young boy, had accompanied Brewer's parents to Asia Minor on the missionary trip on which Brewer was born.

Kansas in 1859 was frontier country. It was currently the scene of a violent struggle between the pro-slavery and anti-slavery forces. John Brown had played there his part in the bloodshed. The rival factions sought to affect the position of Kansas when it became a state; and not until the constitutional convention of 1859, the year Brewer came there, was the bloody issue resolved in favor of a free-soil status which, in turn, led to its admission to the Union in 1861. There have been explanations of Brewer's choice of Kansas, but they must be taken with some reservation. The editor of *Case and Comment* noted on Brewer's death:

> The great West allured him, and he threw in his fortunes with those of Leavenworth, Kansas. He had received his scholastic training at the hands

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[15] Horton, *David Josiah Brewer*, 2 GREEN BAG 1 (1890).

[16] S. J. FIELD, CALIFORNIA ALCALDE 13 (Biobooks ed. 1950). Compare 11 ENCYC., AMERICANA 181 (rev. ed. 1937), where it is stated: "[H]e joined the rush of easterners to the new gold diggings in California and settled in a mining camp known as Yubaville."

> of the East, but his training in affairs came from the new West. We cannot overestimate the influence which this midregion of the midland rivers and the boundless prairies had upon him.[17]

The *Law Notes* writer summarized his decision this way:

> Thinking that the West offered better opportunities for a young lawyer, he left New York, and after visiting several places opened an office for practice of law in Leavenworth, Kansas, in 1859.[18]

A consistent progression of professional success and of public office marked his Kansas career. It is now just a century from the beginning of his public career. In 1861 he was appointed commissioner of the Federal Circuit Court for the district of Kansas; the next year he was elected judge of the probate and criminal courts of Leavenworth County; in 1865 he was elected judge of the first judicial district of Kansas; in 1870, at the age of 33, he was elected to the Supreme Court of Kansas where he served until 1884 when President Arthur appointed him to the Federal Circuit Court of the Eighth Circuit; and finally, five years later, late in 1889, President Harrison appointed him as a justice of the United States Supreme Court [19] where, after his confirmation in 1890, he served over twenty years.

II

Because of his many extra-judicial activities, including teaching, writing, and public speaking, in which he did not shun discussion of controversial matters, Brewer was one of the best known jurists in America to his contemporaries. He is likely to be remembered longest and most held in esteem, however, for his substantial contribution to the cause of peace and international order through the force of law. His contribution in this area can now be seen in the vantage point that half a century affords; for Brewer shared deeply the hope of all thoughtful lawyers that orderly legal processes might replace brutal force in controversies between nations; and he sensed personally the special responsibility of the lawyer to humanity to use his talents, techniques and experience to this end.

The day after the 1904 Albany Law School commencement address Brewer was at the tenth session of the Mohonk Conference on International

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[17] 16 CASE & COM. 361 (1910).

[18] 14 LAW NOTES 26 (1910).

[19] Alluding to Brewer's appointment to the Supreme Court, Chief Justice Horton commented: "Justice Brewer was not an applicant for the position to which he has been chosen. Several prominent members of the bar of his circuit suggested to him, after the death of Mr. Justice Matthews, that he should be a candidate for the vacancy. He declined, and said 'that the office was not one to be contested for, being too high and sacred.' Notwithstanding his positive refusal to make any effort to be placed upon the Supreme Bench, his eminent qualifications for the place were called to the attention of the President. . . . The choice lay, finally, between him and Judge Henry B. Brown, of Michigan. The two men had been classmates at Yale. Judge Brewer wrote a letter to a mutual friend, highly praising his old college-chum and expressing the hope that he would secure the appointment. This letter found its way to the President, as a recommendation for Brown; and its fairness so impressed the President that he appointed Brewer." Horton, *David Josiah Brewer,* 2 GREEN BAG 2 (1890).

Arbitration; and on June 3, he addressed the Conference. "We are here expressing," he said, "the moral sentiment of the nation in reference to this movement which promises in the future the days of universal peace." [20] Personal experience lent weight to his views. In 1895 Congress had created a commission to investigate the disputed boundary between Venezuela and British Guiana. Brewer was appointed by President Cleveland to this commission and became its president, and then served with Chief Justice Fuller on the international arbitration tribunal that heard and settled the dispute.

The first commission was in pursuance of a unilateral inquiry by the United States, acting within the framework of the Monroe Doctrine, to determine whether the demands it would assert on behalf of Venezuela might be reasonable. When the commission was well under way in its work, Great Britain, which had until then refused to treat the controversy as arbitrable, yielded and in 1897 entered into an arbitration treaty with Venezuela. This treaty resulted in the establishment of the arbitration tribunal on which Chief Justice Fuller and Justice Brewer served by designation of the United States Supreme Court. It met in Paris during the summer of 1898 and its award, which did not allow either claim fully, was accepted by the disputing nations. "It was," wrote Charles Henry Butler in 1910, "a distinct triumph for the cause of arbitration to which Chief Justice Fuller and Mr. Justice Brewer largely contributed, by devoting so much of their time, energy and ability." [21]

As we look back over the two decades from 1890 to 1910, it becomes manifest that the "cause of arbitration" was held high as a torch of hope for the world. The gradual increase during the nineteenth century in the use of the arbitration device in individual treaties covering specific subjects indicated confidence that in particular matters arbitration might avoid the use of force. Successful arbitration of single controversies had, in turn, led to the belief that continuing agencies, with the machinery in being and qualified arbitrators ready at hand, could provide facilities to which sovereign disputants might find it convenient and useful to resort as a regular practice.

There can be little doubt that the dramatic success of the tribunal on which Brewer sat in 1898, which disposed of the volatile issue between Great Britain and Venezuela, made particularly delicate by the obligation which the United States had assumed to all states in the Western Hemisphere, was a factor of importance the following year in the 1899 Hague Peace Conference and in the Hague Conference of 1907 which adopted conventions for the general settlement of international disputes and resulted in the creation of the Permanent Court of Arbitration of 1907. The world opinion, the widespread hope, and the strong enthusiasm engendered in this movement, in which Brewer certainly took a vigorous part, powerfully influenced the creation of conditions that made possible the establishment of the League of Nations and its successor, the United Nations.

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[20] HALE & BREWER, MOHONK ADDRESSES 102 (Mead ed. 1910).

[21] Butler, *Melville Weston Fuller-David Josiah Brewer, Memorial Note,* 4 AM. J. INT'L L. 909, 913 (1910).

There was a singular note of optimism, which would not be repressed, at the opening of our century on the imminence of world peace. It was reflected in the addresses at the Mohonk Conferences which began in 1895 and which represented an important segment of American opinion. Many noted American leaders took part. Nicholas Murray Butler was several times the Conference chairman. Edward Everett Hale from the beginning was a leader in the movement and reflected fully its spirit. Four of Hale's annual addresses are entitled "A Permanent Tribunal." In his 1895 address he noted that in place of spasmodic arbitration of disputes, "you are gradually forming a body of international law. . . . For the first time since the days of the Antonines, or perhaps since Adam and Eve, there is somebody to say what international law is. . . ." [22] And in 1899 Hale noted that "this world cannot come to its bearings, does not understand the use of the science it has been creating in the last century, unless it finds out that the human race is but one individual." [23]

The editor of *Mohonk Addresses,* Edwin D. Mead, paying tribute to the contribution of Justice Brewer's addresses to the Mohonk Conferences, took up the main thread of optimism in noting that the conferences had rendered a "peculiar service" in America "for the cause of international arbitration and peace, whose multiplying triumphs at this hour are so great an inspiration. . . ." [24] In the midst of these words of hope and optimism, world forces were disposing themselves, heedless of arbitration or settlement, to cast up the most tragic and at the same time the most inconclusive of bloody enterprises: a folly the world was to repeat again with more technical skill and brutality and more bloodshed before the first half of the century had passed. Yet the cataclysmic wars of the twentieth century were far from being predictable with certainty in the world of 1900, where the idea of peaceful settlement of international disputes by arbitration seemed to be gaining ground.

Brewer shared some of this general optimism. In his 1907 Mohonk address he concluded that "there is through this nation a more intense feeling in respect to the coming of the time of international arbitration and, with that, the time of universal peace." This purpose he described as "a cause so worthy, so dear to my heart." [25] But there was about Brewer's mind a hardness that did not vaporize in sentimentality. He drew deeply both from his judicial experience and from his experience in international arbitration to warn his contemporaries that the way ahead was not easy, and especially that it was not quick. It would take more than a permanent arbitration tribunal and more than a sentiment for peace among right-thinking people to end war. With respect to world peace, "We have no right to expect its immediate coming," he said at the 1904 Conference, "great as is the feeling which prevails, in this country at least." He recalled to his audience that it had taken "unnumbered centuries" to establish the judicial settlement of controversies within nations, and to establish workable and effective systems of law.[26] It was too much to expect, he felt, that "within two or three centuries" we might "bring all nations of the world, over whom there is no power to compel obedience, to accept international arbitration as the only way of settling disputes. . . ." [27] The way ahead would be long and hard. The approval of international arbitration by the Hague Conference of 1899, he felt, was an important step: "[T]he question was settled"; but he still warned that "we have years and perhaps centuries before us. . . ." [28] He felt that public opinion, a power "growing stronger and stronger" would aid in winning acceptance of international arbitration.

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[22] HALE & BREWER, *op. cit. supra* note 20, at 9–10.

[23] *Id.* at 65.

[24] *Id.* at xxv.

[25] *Id.* at 124.

In historical perspective it becomes clear that Brewer's insights were at once accurate and discerning. For exactly the handicaps he saw—the limitations of effectiveness and the extremely long periods that truly useful international agencies require for maturation—have been demonstrated by the hard experience of the last half-century during which more elaborately fashioned international institutions have been established than at any other period in human history. In the atomic age there beats an insistent note of urgency for effective international controls. We repeat nervously to ourselves that we must hurry or we are lost. But what Brewer said in 1904 is true today: the machinery must evolve slowly; it will not be forced. There will be miscarriage and failure. The domestic laws of nations took centuries to develop; effective international law and the machinery to enforce it will perhaps take quite as long. The League of Nations failed; the United Nations may also fail; but that it has lasted as effectively as it has, binding bitter enemies together in the same organization dedicated to peaceful adjustment of controversy and appealing in one way or another to world public opinion, seems a hopeful sign. To Brewer and his contemporaries we are indebted for the promotion of the movement for international control of controversy and for the creation of a climate of public opinion in the United States that ultimately made our membership in the United Nations possible.

To Brewer himself we owe a clear-sighted view of the practical limitations on what can be achieved in this area within a lifetime, coupled with the faith in humanity to fight for the possible. His contribution was both consistent and significant. One of the most important of his addresses was delivered before the New Jersey State Bar Association in 1909, the year before he died: *The Mission of the United States of America in the Cause of Peace*.[29] He was a founder and vice president from its inception of the American Society of International Law. The tribute to him at his death in the *American Journal of International Law* was that he "had done his valiant part in carrying forward the greatest work of modern times—that of establishing peaceful methods for the settlement of international disputes."[30]

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[26] *Id.* at 99.

[27] *Id.* at 100.

[28] *Id.* at 102.

[29] Address of Hon. David J. Brewer, Associate Justice of the Supreme Court of the United States, New Jersey State Bar Association, June 12, 1909, in NEW JERSEY STATE BAR YEARBOOK (1910).

After the passing of a half-century, there is a peculiar contemporary timeliness in the cause for which Brewer stood. "A new and magnificent duty now rests on the legal profession" are the opening words of Judge Robert N. Wilkin's article, *Glorious Opportunity for Lawyers,* in a current issue of the *American Bar Association Journal.* The "duty" and the "opportunity" are "to establish for international affairs a system of enforceable world law."[31]

III

On May 31, 1910, George Woodward Wickersham, Attorney General of the United States, presented to the Supreme Court the resolutions of the bar of that court on the death of Justice Brewer and addressed the Court on the judicial career that had just closed.[32] He noted that in the two decades of his service Justice Brewer had written 719 opinions, in 157 of which he had dissented. He regarded Brewer's opinion in *Kansas v. Colorado*[33] as one of the most important he had written; this was undoubtedly the view of his contemporaries in the profession. A generation after his death that opinion was still regarded as one of his ablest.[34] In that case, on a strict construction of the constitutional powers of the United States in respect of riparian rights in rivers, he wrote for a denial of the right of the federal government to intervene as an interested party in litigation between Kansas and Colorado over diversion by Colorado for irrigation purposes of water of the Arkansas River. The opinion is a monumental effort of over forty pages, embellished with statistical tables, analyzing both the historic role of the states in the control of rivers and the limitations in that area of the powers of the United States. It develops in rather subtle fashion the difference between the legislative power and the judicial power of the United States. Justice Brewer observed:

> When a legislative power is claimed for the National Government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the Constitution on the general grant of national power.[35]

Attorney General Wickersham felt that next to *Kansas v. Colorado* Justice Brewer's opinion in *In re Debs*[36] was "one of the ablest" that he had written. In that case the Court upheld the power of the United States to restrain by injunction a labor dispute that the federal court of equity felt affected or interfered with interstate commerce and the progress of the mails. The opinion developed the analogy between the removal of a physical obstruction on interstate highways and the obstruction created by a combination of workers seeking by strike and boycott to prevent the movement of trains until their economic demands were met. Justice Brewer believed quite strongly in the use of injunctions in labor disputes and in other areas.[37]

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[30] Butler, *supra* note 21, at 911.

[31] Wilkin, *A Glorious Opportunity for Lawyers,* 47 A.B.A.J. 142 (1961).

[32] 218 U.S. viii (1909).

[33] 206 U.S. 46 (1906).

[34] 3 DICTIONARY OF AM. BIOGRAPHY 22 (1929).

[35] 206 U.S. at 83–84.

[36] 158 U.S. 564 (1894).

He agreed with the majority, against the dissent of Holmes and the separate dissents of Harlan, White and Day, in *Lochner v. New York*,[38] holding unconstitutional New York's statute prohibiting working in bakery shops more than sixty hours a week or more than ten hours a day; and he dissented from the decision in *Holden v. Hardy* [39] that upheld a Utah statute limiting the work of miners to eight hours a day.

Still when it came to protection of women in industry his view was quite different. He had been for years an advocate of women's suffrage. In his last Mohonk address in 1908, he had paid an eloquent tribute to the influence of women in American life and in the cause of peace.

> She has come out from the seclusion of the home and taken her place in the public activities of the nation. In conferences, in associations, and in a hundred other ways she is directly and powerfully influencing public thought. . . . [H]er outspoken and visible activities, moulding public opinion, shaping public acts are greater here than anywhere in the world.[40]

So when *Muller v. Oregon* [41] came before the Court, involving the constitutionality of the Oregon statute prohibiting the working of women in certain establishments more than ten hours a day, Justice Brewer wrote the opinion for a unanimous Court to sustain its validity as it affected laundries. The physical disability of women brought it within the power of a State to provide for their protection in industry even though similar protection would be denied to men. He stated flatly that *Lochner v. New York* should not be followed in such a case. He wrote:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.[42]

His opinion in *Wilson v. Shaw*,[43] sustaining the right of the United States to build the Panama Canal, is a significant judicial statement. But in other areas he felt strongly that the power of Congress rests on strict delegation, as has been noted in the case of *Kansas v. Colorado;* and this attitude was apparent, too, in his dissent in *Lottery Case*[44] where the majority upheld a federal prohibition against the transmission of lottery tickets across state lines as being within the Congressional power to regulate commerce.

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[37] 3 DICTIONARY OF AM. BIOGRAPHY 23 (1929).

[38] 198 U.S. 45 (1905).

[39] 169 U.S. 366 (1897).

[40] HALE & BREWER, *op. cit. supra* note 20, at 127–28.

[41] 208 U.S. 412 (1908).

[42] *Id.* at 421.

[43] 204 U.S. 24 (1907).

IV

Brewer was endowed with warm personal qualities; his attachment to those near to him was deep and abiding. He was especially close to Chief Justice Fuller, with whom he served throughout his entire twenty years on the Court; they were often in agreement on the problems confronting the Court for decision. Fuller was to survive Brewer by only a few months. Brewer died on March 28, 1910; Fuller, on July 4. The memorial service for Brewer in the Court on May 31 was the last occasion on which Fuller was to sit in that place. The Chief Justice was profoundly affected by Brewer's death. Charles Henry Butler, who was the reporter of the Court and the writer of the memorial note to both judges in the *American Journal of International Law,* was present and was struck by the emotional impact on Fuller. He said:

> Of all the utterances from the presiding officer of that highest court in the land . . . none have left a deeper impression on the writer than the words which he uttered with heart-felt and throbbing emotion in response to the remarks of the Attorney-General on presenting the resolutions of the bar on the death of Mr. Justice Brewer.[45]

The Chief Justice recalled with sadness the names of those who had served with him and passed on—Matthews, Miller, Field, Bradley, Lamar, Blatchford, Jackson, Gray, Peckham. They were all, he said, men of ability and devotion; they were not alike as personalities; their names will remain illustrious. "And now we are called on to deplore the departure of one of the most lovable of them all."[46]

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[44] 188 U.S. 321 (1903).

[45] Butler, *supra* note 21, at 920.

[46] 218 U.S. xv (1911).

THE LEGAL REQUIREMENTS FOR EQUALITY IN TAX ASSESSMENTS

Robert F. Kilmer *

I

The Standard for Measuring Equality

The purpose of this article is to consider the legal requirements for equality in the ad valorem taxation of real property, focusing particular attention on the application of the federal and state constitutional provisions guaranteeing to the people the equal protection of the laws.[1]

It is a basic principle that a tax must be computed and imposed with reference to some yardstick or standard. In the case of the real property tax, the standard in this state[2] and in all other forty-nine states[3] is the full value of the property. In New York and in most other states, the courts have defined full value to be, in effect, market value in a normal market.[4] Market value has been defined to mean what a willing buyer would pay a willing seller under ordinary circumstances.[5] This standard of full value serves two important legal functions: (1) it fulfils the requirements of the federal and state constitutions with respect to equal protection of the laws in that it supplies a standard for the equitable apportionment of property tax levies among owners of property,[6] and (2) it fulfils the due process requirements of federal and state constitutions in that a taxpayer must have some way of ascertaining whether or not a law imposing the tax has been equitably and fairly applied to him.[7]

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[1] U.S. Const. amend. XIV, § 1; N.Y. Const. art. 1, § 11.

[2] N.Y. Real Property Tax Law § 306. This section provides: "All real property in each assessing unit shall be assessed at the full value thereof."

[3] For a summary of state constitutional and statutory valuation provisions, see Comment, *Tax Assessments of Real Property: A Proposal for Legislative Reform*, 68 Yale L.J. 335, 386 (1958).

[4] See, *e.g.*, People *ex rel.* Parklin Operating Corp. v. Miller, 287 N.Y. 126, 38 N.E.2d 465 (1941); Borst v. Board of Assessors, 6 Misc. 2d 945, 160 N.Y.S.2d 187 (Sup. Ct. 1957); People *ex rel.* Buck v. Rapp, 36 N.Y.S.2d 790 (Sup. Ct.), *aff'd*, 266 App. Div. 709, 41 N.Y.S.2d 185, *appeal denied*, 266 App. Div. 821, 42 N.Y.S.2d 576 (1942); Beeman v. Pawelek, 96 N.Y.S.2d 204 (1949), *aff'd*, 276 App. Div. 1057, 96 N.Y.S.2d 312 (1950); People *ex rel.* Lehigh Valley R.R. v. Harris, 168 Misc. 685, 6 N.Y.S.2d 794 (Sup. Ct.), *aff'd*, 257 App. Div. 912, 12 N.Y.S.2d 1011, *aff'd*, 281 N.Y. 786, 24 N.E.2d 476 (1938). For cases in other jurisdictions see generally 51 Am. Jur. *Taxation* § 701 (1944); 84 C.J.S. *Taxation* § 410 (1954).

[5] Beeman v. Pawelek, *supra* note 4; *In re* Malajo Realty Corp., 60 N.Y.S.2d 15 (Sup. Ct. 1946); People *ex rel.* Lehigh Valley R.R. v. Harris, *supra* note 4.

[6] Fernandez v. Wiener, 326 U.S. 340 (1945); Carmichael v. So. Coal & Coke Co., 301 U.S. 495 (1937); Maxwell v. Bugbee, 250 U.S. 525 (1919); Northwestern Mut. Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918); Louisiana v. Pilsbury, 105 U.S. (15 Otto) 278 (1881).

The standard of full value presents a problem to the administrator and taxpayer alike since the determination as to what is the full value of a particular parcel of property is a matter of expert opinion and judgment. In this respect, it should be pointed out that one of the most distinguishing features of the ad valorem property tax is that it is not merely a mathematical calculation but is a quasi-judicial determination[8] based primarily upon expert opinion and judgment as to the value of the property. Such expert opinion of an assessing official, administrative reviewing agency or judicial officer reviewing the assessment must be made with reference to the standard for assessment, which is the full value of the property. In other words, each individual assessment is the exercise by the assessing official of a quasi-judicial determination based upon his expert opinion of the application of the full value standard to each individual parcel of property subject to assessment.

The main function of the full-value standard is to provide for the equitable apportionment of property tax levies among owners of property. The full-value standard, therefore, is merely a means to the end—equality of treatment. Thus, the full-value standard establishes the basis for determining what equality is. It should be observed that assessment at 100 per cent of full value is not necessary in order to achieve equality. If all property within a tax district is uniformly assessed at a percentage of full value, equality is achieved within the district. Thus, within the boundaries of a town, whether an assessor assesses at 100 per cent of full value, 70 per cent, or 50 per cent of full value, the tax bills of the owners of the property in that town will be, in each case, in the same proportion.

The equal protection of the laws provision of the federal constitution does not preclude the Congress and legislatures of the states from making reasonable classifications of persons and things for the purpose of regulation or taxation.[9] For example, it would be constitutional to provide by law for a property tax on certain types of property and exclude other types from taxation,[10] and it would be constitutional to tax one type of property at a higher rate than another type, if so directed by law.[11] The classifications must be reasonable,[12] and all persons or property within such classifications must be accorded equal treatment under the law.[13]

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[7] Hagar v. Reclamation Dist. No. 108, 111 U.S. 701 (1884).

[8] National Bank of Chemung v. City of Elmira, 58 N.Y. 49 (1873); Western R.R. v. Nolan, 48 N.Y. 513, 518 (1872); see Godfrey, *Enforcement of Delinquent Property Taxes in New York* (pt. 2), 25 Albany L. Rev. 39, 55–57 (1961).

[9] Myer v. Myer, 271 App. Div. 465, 66 N.Y.S.2d 83, *aff'd,* 296 N.Y. 979, 73 N.E.2d 562 (1946); Mallary, Inc. v. City of New Rochelle, 184 Misc. 66, 53 N.Y.S.2d 643 (Sup. Ct.), *aff'd,* 268 App. Div. 878, 51 N.Y.S.2d 91, *aff'd,* 295 N.Y. 712, 65 N.E.2d 425 (1944); People *ex rel.* Village of Lawrence v. Kraushaar, 195 Misc. 487, 89 N.Y.S.2d 685 (Nassau Dist. Ct. 1949); Russo v. Morgan, 174 Misc. 1013, 21 N.Y.S.2d 637 (Sup. Ct. 1940).

[10] Carmichael v. So. Coal & Coke Co., 301 U.S. 495 (1937); Maxwell v. Bugbee, 250 U.S. 525 (1919); Northwestern Mut. Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918).

[11] Myer v. Myer, 271 App. Div. 465, 66 N.Y.S.2d 83, *aff'd,* 296 N.Y. 979, 73 N.E.2d 562 (1946); Packer Collegiate Institute v. University of State of New York, 273 App. Div. 203, 76 N.Y.S.2d 499, *rev'd on other grounds,* 298 N.Y. 184, 81 N.E.2d 80 (1948);

In New York State, the real property tax has been classified geographically.[14] Each city, town and village is a separate assessing unit and thus separately classified for purposes of taxation. Taxpayers, therefore, are entitled only to equality of treatment in the assessment of real property situated within a particular city, town or village. For example, a taxpayer in town A has no legal cause for redress if, in fact, property in town B is assessed at a lower percentage of full value.

II

THE APPLICATION OF THE STANDARD

The application of the full-value standard presents certain practical and legal problems. In the first place, since the property tax is not a mathematical calculation, there is no practical way of "auditing" the tax to determine whether there has been compliance with the law in its administration. Whether or not a particular assessment is equitable involves a question of expert opinion and judgment. Accordingly, the assessing official must make a judgment as to the full value of each parcel within his jurisdiction.

Legal rights come into operation when it is alleged that the assessing official has made an erroneous determination of this amount or has treated other properties within the jurisdiction in a different way with the result that the full-value standard has not been uniformly and equitably applied to all properties within the assessing unit. For example, the assessor may be assessing commercial property at 100 per cent of full value and residential property at 50 per cent of full value, or he may be assessing new homes at 100 per cent and older properties at some lower per cent of full value. This results in an inequitable apportionment of the tax and, when done intentionally, violates the equal protection of the laws provisions of the federal and state constitutions.[15] The problem is two-fold: (1) a taxpayer must have some way of determining whether or not he has been equitably treated, and (2) when he has determined that he has been inequitably treated, he must have some means of obtaining relief.[16]

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436 West 34th Street Corp. v. McGoldrick, 288 N.Y. 346, 43 N.E.2d 436, *motion for reargument denied,* 289 N.Y. 673, 45 N.E.2d 175 (1942); People *ex rel.* Moffet v. Bates, 276 App. Div. 38, 93 N.Y.S.2d 313 (1949), *aff'd,* 301 N.Y. 597, 93 N.E.2d 494, *cert. denied,* 340 U.S. 865 (1950).

[12] Carmichael v. So. Coal & Coke Co., 301 U.S. 495 (1937); Alward v. Johnson, 282 U.S. 509 (1931); Florida, C. & P.R.R. v. Reynolds, 183 U.S. 471 (1902).

[13] Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946); Stebbins v. Riley, 268 U.S. 137 (1925); Oliver Iron Mine Co. v. Lord, 262 U.S. 172 (1922); Kentucky Union Co. v. Kentucky, 219 U.S. 140 (1911).

[14] N.Y. REAL PROPERTY TAX LAW §§ 102(1), 512, 706.

[15] Sunday Lake Iron Co. v. Wakefield Township, 247 U.S. 350 (1918); see Powell, *Supreme Court Condonations and Condemnations of Discriminatory State Taxation, 1922–1925,* 12 VA. L. REV. 441, 458–60 (1926).

[16] See Cook, *Some Basic Principles of State and Local Taxation,* 30 TAXES 736, 742–45 (1952).

III

ADJUSTMENT TO THE STANDARD

Before considering the aspect of the problem as to how a taxpayer can obtain relief from inequality, the term "equalization" should be discussed. This term is often used to refer to two different situations: (1) the equalization of assessments on an assessment roll *within* a locality, and (2) the equalization of assessment rolls *among* localities where more than one roll is used for the imposition of a common tax, such as the equalization by counties of assessment rolls of cities and towns within the county for purposes of apportioning the county tax.[17] Methods and procedures relating to the first category generally involve appraisal techniques, taxpayer grievance procedures and court remedies for relief from inequitable assessments. Those relating to the second category generally involve the establishment of "equalization rates"—the ratio of the assessed values placed upon properties by an assessor to the full values of such properties as determined by the body or agency establishing the equalization rates.

Equalization is the process of bringing about uniformity of two or more things in relation to a common base or standard, which, in the case of the real property tax, is full value. For example, if in one city, the temperature is reported as 90 and in another city it is reported at 60, naturally it would be assumed that the temperatures were reported in degrees Fahrenheit or in degrees centigrade. If, in fact, one were in degrees Fahrenheit and one were in degrees centigrade, the reported information would not offer any basis for equitable comparison because the two figures would not be related or equalized in reference to a common measure or standard. An application of this principle to the real property tax requires not only that all taxpayers' property must be assessed at the same percentage of full value, but also that the same definition of full value be used for all properties within the assessor's jurisdiction. For example, it would not be equitable to use 1941 price levels for some of the properties in the jurisdiction and 1959 price levels for other properties in the jurisdiction.

There are three possible methods that might be provided for by law to enable a taxpayer to obtain relief from inequality. For purposes of illustration, a simple situation may be considered, where the aggrieved taxpayer's property is assessed at 100 per cent but all other property in the assessing unit is assessed on the average of 50 per cent of full value. This taxpayer must be given some type of relief. The following are three possible methods of achieving equality that might be provided for by law:

1. The court, or other reviewing agency, could raise all the assessments to 100 per cent of full value.

2. The court, or other reviewing agency, could declare the assessment roll illegal on the ground that it contained assessments made in violation of the constitutional or statutory standard.

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[17] See Lee, *State Equalization of Local Assessments*, 6 NAT'L TAX J. 176 (1956).

3. The court, or other reviewing authority, could reduce the aggrieved taxpayer's assessment to 50 per cent of full value and thus place him in the same mathematical relationship to the full-value standard.

The first possible method—raising other assessments to 100 per cent of full value—presents serious legal and practical obstacles.[18] Since increasing assessments on the properties of other persons who are not parties to the reviewing action will result in such parties paying an additional tax, notice and an opportunity to be heard on the increase must be afforded to such property owners. However, such a method would be extremely time-consuming and costly. It appears that the Supreme Court of the United States has never rendered a decision approving, as an adequate taxpayer remedy for inequality of assessment, a method whereby assessments must be increased on other properties within a jurisdiction in order to secure equality. In fact, in *Sioux City Bridge Co. v. Dakota County,*[19] the Supreme Court expressly disapproved, as an adequate taxpayer remedy for inequality of assessments, a procedure in one state that provided, in effect, that a taxpayer must file a complaint with respect to each individual assessment in his tax unit that he alleged must be increased in order to secure equality for his property. The Court stated that such a procedure contemplating mass complaints on the part of a taxpayer was not an adequate remedy for a taxpayer.

The second possible method—declaring the assessment roll void and illegal—is an adequate legal remedy to the taxpayer from the standpoint of receiving relief from an inequitable assessment, but is certainly not practical from the standpoint of the unit of government that is waiting for its tax money.[20] Moreover, it may be difficult for the court that declares the assessment roll void to secure a more equitable roll when a new roll is prepared. The court itself could not make a new assessment roll, since such a task is an executive function, not a judicial function; thus the court can only resort to ordering the assessing officials to make new assessments. The second method was recently used in the state of Connecticut. In the case of *E. Ingraham Co. v. Town & City of Bristol,*[21] it was demonstrated to the Connecticut Supreme Court that the city assessors were assessing real property at one percentage of full value and personal property at another percentage of full value. Further, within the area of personal property, automobiles were being assessed at a higher percentage of full value than other personal property. Under Connecticut law, assessments of both real and personal property were to be made at 100 per cent of full value. The court held that there was an apparent intent to assess at lower percentages of full value in violation of the statute and that the assessment roll was therefore illegal. Subsequently, the Connecticut Legislature amended this standard to provide that property should be assessed at a uniform percentage of full value.[22]

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[18] Some of the earlier cases indicated that the remedy of the taxpayer whose property was assessed at a higher value than the average property in the community was to compel the appropriate board or body to increase the other assessments that were relatively too low. See, *e.g.*, Lincoln Tel. & Tel. Co. v. Johnson County, 102 Neb. 254, 166 N.W. 627 (1918); State v. Segoine, 53 N.J.L. 339, 21 Atl. 852 (Sup. Ct. 1891).

[19] 260 U.S. 441 (1923), *reversing* 105 Neb. 843, 182 N.W. 485 (1921).

[20] For cases declaring the entire assessment roll void, see, *e.g.*, Harjim, Inc. v. Owens, 52 F.2d 530 (S.D. Fla. 1931); Auditor General v. Hughitt, 132 Mich. 311, 93 N.W. 621 (1903).

[21] 144 Conn. 374, 132 A.2d 563 (1957).

The third possible method—reducing the assessment of a taxpayer who claims inequality to the same percentage of full value as the average of other property on the same assessment roll—appears to be the most practical method of affording a taxpayer relief from inequality. However, this last method has raised an interesting legal question. Most states have either a state constitutional or statutory requirement to assess at full value,[23] but in most states with such a requirement property is generally assessed at substantially less than full value. In those instances where property is generally assessed at less than full value and property of one taxpayer is assessed at full value but property of other taxpayers is assessed at amounts less than full value, a legal conflict arises. The conflict arises because it can be said that as to the taxpayer assessed at full value, the law has been complied with, *i.e.*, the requirement to assess at full value. Since such a taxpayer would pay more than his fair share of taxes, his assessment at full value would appear to result in a denial of the equal protection of the laws under the United States Constitution. This apparent conflict can be best illustrated by the case of *Sioux City Bridge Co. v. Dakota County* [24] in which the Supreme Court passed directly upon this question. In that case, a bridge company in Nebraska had been assessed at 100 per cent of full value, while other property in the county where the bridge company was located had been assessed at only 55 per cent of its full value. The Nebraska statute required that all property be valued at full value. The bridge company objected to the assessment and appeared before the assessment review body empowered to hear complaints. The company argued that its assessment should be reduced to 55 per cent of full value and that the failure of this reviewing body to do so would result in the bridge company's being denied the equal protection of the laws. The assessment review body, and subsequently the state courts, refused to reduce the assessment of the bridge company to 55 per cent of full value in view of the statutory requirement to assess at full value. In reversing the judgment of the Supreme Court of Nebraska, the Court approved the following statement from *Sunday Lake Iron Co. v. Wakefield:* [25]

> The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervalua-

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[22] Conn. Public Acts 1957, No. 673, at 1090.

[23] See Comment, *Tax Assessments of Real Property: A Proposal for Legislative Reform,* 68 YALE L.J. 335, 386 (1958).

[24] 260 U.S. 441 (1923), *reversing* 105 Neb. 843, 182 N.W. 485 (1921).

[25] 247 U.S. 350 (1918).

> tion by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.[26]

The Supreme Court recognized the dilemma presented where one or a few of a class of taxpayers are assessed at 100 per cent of the value of their property in accord with a constitutional or statutory requirement and the rest of the class are intentionally assessed at a much lower percentage in violation of the law. However, the Court, maintaining that no doubt existed as to the position adopted by the federal courts in enforcing uniformity requirements embodied in state statutes and constitutions and the equal protection clause of the fourteenth amendment, concluded:

> [S]uch a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district. This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that *where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.* In substance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company.[27]

Recently, this case was followed by the Supreme Court of Oklahoma, in a case involving a situation in which the assessors assessed a bank building at a higher percentage of full value than other property within the assessors' jurisdiction.[28] The bank claimed that it was entitled to have its property assessed at the same uniform percentage of full value as other property in the tax unit and that the action of the assessors was discriminatory and unjust. The court stated that in assessing property for ad valorem tax purposes, uniformity and equality required by the fourteenth amendment to the federal constitution takes precedence over the requirement of the state constitution that property be assessed "at its fair cash value" where compliance with both provisions is impossible.[29]

It seems clear from examining these three possible methods that the most practical way to give a taxpayer relief from inequality is to reduce his assessment to the same percentage of full value at which other property is assessed, thus placing his assessment in the same relationship to the full-value standard as the assessments of other taxpayers. This raises the question as to the practicality of requiring assessment at full value, if assessing at a uniform percentage achieves the same objective and avoids the conflict between the equal protection of the laws requirement of the Constitution and the requirement to assess at full value. It should be noted, however, that one of the claimed advantages of assessment at 100 per cent of full value is that if assessment were in fact at 100 per cent of full value, a taxpayer would only have to look at his own assessment. This claimed advantage is merely theoretical. From a practical standpoint, taxpayers may be misled in examining only their own assessments. For example, assume a taxpayer knows his house is worth $10,000, and it is assessed for $7,500, or 75 per cent of full value. But if, on the average, all other property is assessed at 50 per cent of full value, the taxpayer has a grievance and is entitled to relief—reduction to 50 per cent. Therefore, the taxpayer is in a dilemma. In order to know whether he is fairly treated, he must not only look at his own assessment but in some manner must determine what percentage of full value the assessor is placing other properties on the roll. This situation has created serious misunderstandings on the part of taxpayers, sometimes leading them to accept inequitably high assessments. Some taxpayers may feel satisfied as long as their assessments are lower than full value. While they may think they are being favored, they may, in fact, be paying more than their fair share in taxes.

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[26] *Id.* at 352–53.

[27] 260 U.S. at 446–47. (Emphasis added.) See *In re* Harleigh Realty Co., 299 Pa. 385, 149 Atl. 653 (1930); Arlington Mills v. Salem, 83 N.H. 148, 140 Atl. 163 (1927); Luce, *Assessment of Real Property for Taxation,* 35 MICH. L. REV. 1217, 1238–49 (1937); Note, *Remedies for Unequal Property Tax Assessments,* 46 HARV. L. REV. 1000 (1933). See also Great Northern Ry. v. Weeks, 297 U.S. 135 (1936).

[28] Appeal of National Bank of Tulsa, 312 P.2d 495 (Okla. 1957).

[29] *Id.* at 498.

In New York, the requirement to assess at full value has been the law for more than a hundred years, and for more than a hundred years assessors have been deliberately assessing at less than full value.[30] There are 1544 cities, towns and villages in the state. Slightly over 77 per cent assess at less than 50 per cent of full value, and 10 per cent at less than 25 per cent of full value.[31] There does not seem to be any practical way to compel assessors to assess at full value. Various devices have been used in an attempt to enforce full-value assessment. One such device is the oath required of an assessor in many states whereby he is required to swear, supposedly under the penalties of perjury, that he has assessed all property at full value.[32] However, the oath has not been an effective enforcement device.[33]

Recently, in New Jersey, an attempt was made to enforce full-value assessment in the case of *Switz v. Township of Middletown*.[34] There a court order was obtained to require the reassessment of all real property in the state at 100 per cent of full value by January, 1959.[35] Subsequently, legislation was enacted that required assessment at a specified percentage of true value ranging from 20 to 100 per cent depending on the choice of each county board of taxation.[36] It should be noted that the requirement to assess at a fixed percentage of full value raises all the legal and practical problems outlined previously with respect to the taxpayer's problem of securing equality of assessment.[37]

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[30] For early legislative recognition in New York of the need for equalization among units of government, see N.Y. Sess. Laws 1799, ch. 72 (county equalization); N.Y. Sess. Laws 1859, ch. 312 (state equalization).

[31] These figures are obtained from statistics compiled by the research and statistics staff of the New York State Board of Equalization and Assessment.

[32] See, *e.g.*, N.Y. REAL PROPERTY TAX LAW § 514.

[33] There appear to be no reported cases in New York State involving application of the perjury provisions. With respect to the oath, see, *e.g.*, People *ex rel.* Westchester County v. Fowler, 55 N.Y. 252 (1873); People *ex rel.* Congress Hall v. Ouderkirk, 120 App. Div. 650, 105 N.Y. Supp. 134 (1907).

[34] 23 N.J. 580, 130 A.2d 15 (1957).

It is submitted that probably one of the reasons why these and other enforcement devices have not been effective is the fact that full value is a matter of expert opinion and judgment. It is not an easy matter to prove that assessments are not at full value and, in effect, to persuade a reviewing body to substitute another expert opinion of full value for that of the assessor. If full-value assessment cannot be enforced and the objective of full-value assessment can be achieved by other means, why require it? Why not require assessment at a uniform percentage of full value, which is the percentage to be determined by the assessor, and thereby eliminate the requirement to assess at full value that has led to disregard for the law and impaired the public respect for the integrity of assessors? As previously indicated, the objective of the assessing operation is equitable treatment. Equality is achieved when all assessments are in the same percentage of full value, whether that percentage is 100, 50 or some other figure. In addition, it might be advisable to consider a procedure that would require the assessor to indicate on the assessment roll the percentage of full value that he claimed he used in assessing property, and the year or years used as a base in his estimate of full value. For example, an assessor might be required to file a statement to the effect that he assessed all property at 75 per cent of full value, and that he based his estimate of full value on 1958 market values.

The requirement to assess at full value is only useful as long as it results in the equality of treatment of taxpayers within an assessing unit. Since full value is only a means to achieve equality and uniformity, it would be more practical from the standpoint of government and the standpoint of taxpayers to require the assessor to assess at a uniform percentage of full value. Such a system would eliminate some of the misunderstandings that exist in relation to the primary and overriding duty of the assessor, which is to treat everyone equally. A requirement to assess at a uniform percentage of full value, coupled with procedures that would inform taxpayers of the percentage of full value and the base years claimed to have been used in making assessments, would provide a practical foundation for development of a system in which taxpayers could perform their full role in achieving assessment equality.

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[35] For the position of the New Jersey courts in earlier cases dealing with the problem, see Lasser, *Assessment of Real Property in New Jersey: An Appraisal of the Baldwin Case*, 9 RUTGERS L. REV. 497 (1955).

[36] N.J. STAT. ANN. §§ 54:4–2.25, 54:4–2.26, 54:4–2.27 (1960).

[37] A claimed practical advantage is that a taxpayer might not be so easily lulled into accepting without question an assessment that is less than his estimate of the full value of his property.

ENFORCEMENT OF DELINQUENT PROPERTY TAXES IN NEW YORK

PART III

Edward S. Godfrey *

C. THE ADMINISTRATIVE TAX SALE IN NEW YORK AFTER 1850 (*continued*)

4. *Right of the Property Owner to Notice and Hearing.*—The principle is strongly entrenched in our law that, except in certain grave emergencies such as civil insurrection, a private citizen should not be deprived of his property by official action directed specifically against his interests unless procedures reasonably designed to give him advance warning of the possibility of such action and an opportunity to be heard are provided by law and faithfully complied with by the responsible officers.[1] The New York legislature and courts have given that principle powerful application in the field of property taxation, no doubt influenced by the compulsory effect that assessment and levy normally have in creating a lien on the taxpayer's real property,[2] as well as by the drastic ultimate sanction of virtual forfei-

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[1] Compare 1 COOLEY, TAXATION 595 (3d ed. 1903): "The proceedings in the assessment of a tax are not, in any proper sense, hostile to the citizen; they are, on the other hand, proceedings necessary and indispensable to the determination of the exact share which each resident or property owner should take, and may and should be supposed desirous of taking, in meeting the public necessity for a revenue;—proceedings which the willingness of the taxpayer cannot dispense with, and which only become hostile when the duty to pay, once fixed, fails to be performed by payment. Then, and only then, do the steps taken by the government assume a compulsory form; until then the reasonable presumption is that government and taxpayer will act together in harmony, and that the latter will meet his obligation to pay as soon as the former has performed its duty in determining the share to be paid." The many judicial decisions requiring substantial compliance with all notice-giving procedures in the assessment process, on the theory that such procedures are designed for the security of the citizen, suggest that Judge Cooley's point of view on this general question was not entirely in accord with that of the courts of the last century. At least, they seem to have regarded statutory provisions for notice as mandatory from beginning to end of the assessment, as well as the collection, process.

[2] By statute, that lien is now effective, in the case of a tax levied by a county board of supervisors, as of January 1 of the fiscal year for which levied, unless otherwise provided by law. N.Y. REAL PROPERTY TAX LAW § 902. Special statutes applicable to Erie, Monroe, Nassau, Suffolk and Westchester counties are summarized in 2 CCH STATE TAX REP. *N.Y.*, ¶ 23–054 (1960). For special provisions of city charters, other than that of New York City, see 2 *id.* ¶ 71–051. General taxes on real estate in New York City become liens as of the date when the two instalments thereof become due and payable; *viz.*, October 1 and April 1. N.Y. CITY CHARTER § 172.

A school tax becomes a lien as of the date and hour of confirmation or final adoption of the school tax roll by the school authorities. N.Y. REAL PROPERTY TAX LAW § 1312. A village tax becomes a lien from the first day of the fiscal year for which it is levied. N.Y. REAL PROPERTY TAX LAW § 1422. *But compare* N.Y. VILLAGE LAW § 328-a(7), applicable to villages having boundaries coterminous with those of towns in certain counties. Formerly, where legislation did not specify the date when the lien attached, the critical date was that of confirmation of the assessment roll by the agency charged with ture by administrative sale. Moreover, with respect to the particular process of assessment, judicial insistence upon faithful compliance with procedures for notice and hearing may have been nurtured by the idea—somewhat uncertain in application, as we have seen—that assessors act in a quasi-judicial capacity in performing their functions.[3] Since, traditionally, the courts have accorded great respect to requirements of notice in deciding questions of their own jurisdiction, it is not surprising that they should have treated assessors as bound by parallel limitations when acting "quasi-judicially."

Since the concept of jurisdiction proved adaptable enough to serve as a formula for testing the validity of purely administrative actions at various stages of the tax collection process,[4] it was an easy step to treat official failure to give notice, where prescribed by statute, as nullifying later administrative action all along the line. Thus, errors or omissions in the newspaper advertisement of tax sales,[5] in the publication of the official notice of unredeemed lands,[6] or in the service by a tax grantee upon an occupant

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the duty of such confirmation. Getman v. Niferopulos, 276 N.Y. 161, 11 N.E.2d 713 (1937). The statement in the text may not have been strictly true in the early nineteenth century, since, as noted in Part I of this article under the Revised Laws of 1813 the tax against a resident was not originally in rem. 24 ALBANY L. REV. 271, 292 (1960). Today section 304 of the Real Property Tax Law specifically provides that all assessments shall be against the real property itself. See also N.Y. Real Property Tax Law § 1308, providing that school taxes shall be deemed levied against the land itself.

[3] See Part II of this article, 25 ALBANY L. REV. 39, 55–57 (1961).

[4] *Id.* at 50–53. An early leading case was Van Rensselaer v. Witbeck, 7 N.Y. 517 (1852), holding a tax collector personally liable for collecting taxes under a warrant accompanied by an insufficiently verified assessment roll. The court took the position that the board of supervisors acted "without jurisdiction" when it levied on the basis of the defective roll.

An interesting application of the jurisdictional requirement for effective administrative action in property taxation appears in the ancient feature of the New York property tax system that gives immunity to landowners who are nonresidents of a tax district from personal liability for taxes levied against their lands in the district. That feature is a legislative expression of the idea that the tax officials of the district should not be given in personam jurisdiction over a nonresident of the district. Village of Massapequa Park v. Massapequa Park Villa Sites, Inc., 278 N.Y. 28, 30–31, 15 N.E.2d 177, 178 (1938). The parallelism between this limitation on the power of assessors and the limitations placed upon the power of inferior courts to reach nonresidents with their process is striking.

It has generally been deemed to be a requisite for administrative jurisdiction in the processes for enforcing collection of a property tax, that the tax have not been paid in fact; where it has been fully paid, an administrative sale, whether through mistake of tax officials or their deliberate disregard of the fact of payment, is void. Joslyn v. Rockwell, 128 N.Y. 334, 28 N.E. 604 (1891) (alternative holding); see generally BLACK, TAX TITLES § 156 (2d ed. 1893). The curative statute of 1885 (N.Y. Sess. Laws 1885, ch. 448), which was in effect when the *Joslyn* case was decided, expressly recognized that in any case where a tax had been "legally" paid the presumptions of regularity attached by that legislation to tax conveyances and certificates should not be applied. The court in the *Joslyn* case did not rely upon that exception in the statute—at least explicitly—as the basis for its decision, but adopted the view that prior payment of the tax had deprived the comptroller of all jurisdiction to sell.

[5] Olds v. City of Jamestown, 280 N.Y. 281, 20 N.E.2d 756 (1939); Chornoma v. Field, 14 Misc. 2d 746, 178 N.Y.S.2d 341 (1958).

[6] Clason v. Baldwin, 152 N.Y. 204, 46 N.E. 322 (1897).

of notice to redeem,[7] were treated as "jurisdictional," with fatal effect upon subsequent official action, even when the basic quasi-judicial act of assessment itself had been validly performed. The series of official acts, from assessment to enforcement by sale and conveyance, came to be thought of as a chain, each link of which had to be jurisdictionally sound in order to support the subsequent links. Where applicable legislation provided for notice in some form to the landowner before any particular step in the assessment, levy, collection and enforcement process was to be taken, an unremedied failure to give the prescribed notice was thought to invalidate all subsequent official actions to enforce the tax. Such provisions were deemed mandatory as measures "designed for the security of the persons taxed." [8]

Under the fourteenth amendment to the federal constitution, due process of law in ad valorem taxation of property by municipalities requires some procedure for notice to the taxpayer and an opportunity for him to be heard at some stage of the proceedings before the tax becomes irrevocably fixed, concerning the validity of the tax and the amount of the assessment of his property.[9] Due process under the federal constitution does not require, however, that notice of the assessment and opportunity to contest it must be given in advance of the making of the assessment, provided that before the tax is exacted and the command to pay it becomes final and irrevocable the owner has an opportunity to offer objections concerning his liability or the value of his property to an agency competent to give relief.[10] Such notice does not have to be personal to satisfy the constitutional requirement; it will be deemed adequately afforded merely by compliance with a publication statute [11] or with legislation fixing the time and place for public hearing of complaints by an agency or tribunal having the power to revise or annul the assessment.[12] Furthermore, one hearing before final judgment, with full opportunity to submit evidence and arguments, seems to be sufficient to constitute due process.[13] Even if a taxpayer has had no notice of a hearing held by a municipal agency for the purposes of assessing his property, he is not denied due process if he is duly notified of the agency's decision and has the right to appeal the decision to a court having jurisdiction to hear him and review the assessment.[14]

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[7] Under the tax law in effect before 1893, failure to give notice to redeem in the case of occupied land rendered the tax conveyance invalid regardless of the lapse of time. Ostrander v. Reis, 206 N.Y. 448, 100 N.E. 37 (1912). Failure to serve such notice to redeem no longer prevents the tax grantee from obtaining absolute title upon expiration of the three-year period from the last date of the tax sale if the property is not redeemed. Mabie v. Fuller, 255 N.Y. 194, 174 N.E. 450 (1931). Even today, if the notice is not served on the proper party, the premises may be redeemed until the end of the three-year period. The risk of mistaking the identity of the "occupant" is on the tax grantee. Bodinger v. Garrison, 250 App. Div. 463, 294 N.Y. Supp. 916 (1937).

[8] Cruger v. Dougherty, 43 N.Y. 107, 121 (1870). Mr. R. G. Patton, comparing the administrative sale with judicial foreclosure as a method for enforcing collection of delinquent property taxes, concludes as follows: "In one system, the state enforces the collection of taxes by use of the judicial machinery of its courts; in the other, by means of its administrative officers; but under both systems much the same procedure must be followed in order to constitute due process of law." 3 AMERICAN LAW OF PROPERTY § 13.20, 541 (1952).

[9] Turner v. Wade, 254 U.S. 64 (1920); Central of Ga. Ry. v. Wright, 207 U.S. 127 (1907); see also Londoner v. City and County of Denver, 210 U.S. 373 (1908). In the *Turner* case, it was held that due process had been denied a taxpayer in the following circumstances: The county board of supervisors, pursuant to Georgia law, had increased the taxpayer's assessment without notice or hearing, except that after the assessment had been made, he was notified of that fact and permitted, under a provision of the statute, to appear and contest the decision before a board of arbitrators. He did appear, but the arbitrators, though conceding that the assessment was too high, failed to agree on the proper valuation of his property. The *Central of Georgia* decision held invalid a state statute that gave the taxpayer a right to contest an assessment, made without notice or opportunity for hearing, only on the ground of "bad faith" on the part of the assessors. The Court rejected the argument that by failing to include certain personal property in its return, honestly supposing that property to be exempt, the taxpayer must be deemed to have submitted itself to "the doom of the assessor" and forfeited all right to any hearing on the question of exemption except by attacking the good faith of the assessors.

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[10] Nickey v. Mississippi, 292 U.S. 393 (1934); Wells, Fargo & Co. v. Nevada, 248 U.S. 165 (1918). The *Nickey* case involved an assessment made against a nonresident without notice or opportunity to be heard, but the Mississippi tax statute provided merely that the assessment rolls should be deemed prima facie correct: in any action by the state to collect the tax, the taxpayer could defend by attacking the correctness and validity of the assessment. The Mississippi court's view of the matter was, in effect, that the court proceeding, not the assessment, fixed the liability to pay the tax. So construed, the statute was held not to violate the fourteenth amendment.

[11] Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526 (1895).

[12] Michigan Cent. R.R. v. Powers, 201 U.S. 245 (1906); see also Hagar v. Reclamation Dist. No. 108, 111 U.S. 701 (1884); Taylor v. Secor (State Railroad Tax Cases), 92 U.S. 575 (1876). The *State Railroad Tax Cases* upheld the raising of valuations without notice to the taxpayer by a board of equalization in the performance of its equalization function. The Court observed that to hold otherwise would render the exercise of the main function of an equalization board impossible because of the expense and delay involved in giving notice to all taxpayers affected. 92 U.S. at 609. See generally Annots., 24 A.L.R. 331 (1923); 84 A.L.R. 197 (1933).

The *Hagar* case involved improvement assessments for reclamation of marsh land. In the Court's opinion, per Field, J., it was said (111 U.S. at 709–10):

> Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. . . .
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> But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law. (Footnote omitted.)

[13] Michigan Cent. R.R. v. Powers, *supra* note 12, at 302.

[14] Pittsburgh, C.C. & St. L. Ry. v. Board of Public Works, 172 U.S. 32 (1898).

The rules of federal due process relating to assessments for special improvements are similar. Where a local improvement territory is selected, and the burden of the improvement is spread by the legislature or by a municipality to which the state has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits.[15] But, where the improvement district has not been created by a legislative body and where no legislative determination has been made that a landowner's property will be benefited by a local improvement, such an owner must be given an opportunity to be heard on the question.[16] This does not mean that he has a constitutional right to be heard in opposition to the adoption of a resolution authorizing an improvement program that may end in assessment.[17] But, as in the case of an assessment for general taxes, an owner assessed on an ad valorem basis has a right to a hearing upon the allocation of the burden as it affects his own interests.[18] That right is not adequately afforded merely by an opportunity to submit objections in writing to the municipal body charged with apportionment, without any right to appear personally to submit evidence and argument, where the municipal body's decision is not subject to any review.[19]

From the foregoing summary, the general conclusion seems justified that due process of law under the federal constitution in the levy and collection of taxes and improvement assessments does not require such forms of notice to the taxpayer as would be deemed necessary for a valid judgment of a judicial tribunal. With a consistency that is remarkable in view of its earlier hostility to tax titles, the Supreme Court has adhered to the general position stated by Mr. Justice Bradley in 1890:

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[15] Valley Farms Co. v. Westchester County, 261 U.S. 155 (1923). Whether the entire amount or a part only of the cost of a local improvement is to be imposed, as a special tax on the property benefited, and whether the tax burden is to be distributed upon a consideration of the particular benefit to particular lots, or apportioned according to their street frontage, their assessed values, or their area, is a matter of legislative discretion, subject to judicial review only in cases of actual abuse of power or substantial error in executing it. Hancock v. City of Muskogee, 250 U.S. 454, 459 (1919).

[16] Browning v. Hooper, 269 U.S. 396 (1926); see 1 MERRILL, NOTICE § 516, 503–04 (1952). Professor Merrill says, at page 504: "The basis of this doctrine is somewhat difficult to discern but it probably stems from the theory that all interests of the community are represented adequately in legislative bodies, whereas before other tribunals one may need to plead his cause and should have sufficient notification to enable him to do so. However, some cases [decided by state courts] have required notification and hearing even when the decision as to benefits and boundaries was left to a local legislative body." (Footnotes omitted.)

[17] Utley v. City of St. Petersburg, 292 U.S. 106 (1934).

[18] Londoner v. City & County of Denver, 210 U.S. 373 (1908). There is some authority, however, for the proposition that the owner has no constitutional right to a hearing with respect to the mode in which improvement costs shall be apportioned where applicable legislation requires the apportionment to be made by a mere mathematical calculation, based on frontage or area. Hancock v. City of Muskogee, 250 U.S. 454, 458–59 (1919).

[19] Londoner v. City & County of Denver, *supra* note 18. "If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." 210 U.S. at 386.

> The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law, when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them.[20]

The conclusion seems justified today, as it did over fifty years ago, that in "the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States." [21] One may surmise that this *laissez-faire* policy in the treatment of customary state taxing processes was fostered by an awareness on the part of the Court that the federal government had virtually preempted the then most easily managed sources of revenue: [22] any serious impairment of the power of the states to raise taxes by established summary procedures might well have created a serious fiscal crisis. Thus, to have insisted upon anything like a requirement of personal notice to property owners as a condition to valid property taxation would have given them, as a class, too great a practical opportunity to frustrate the collection of an important volume of revenue. On the other hand, the Supreme Court has manifested willingness on proper occasion to invoke the due process clause to nullify action by taxing authorities where a state or municipality has failed to follow even customary summary notice procedures.[23] Even customary notice procedures may not suffice in highly special cases.[24]

Long before the Supreme Court of the United States elaborated its standards of notice and hearing in the area of property taxation, the property tax legislation of New York contained numerous provisions designed to give notice to property owners of official action about to be taken affecting their property interests and to afford them an opportunity to be heard. Without a doubt, the ancient procedures for notice and hearing, woven into the property tax legislation of New York at many points, satisfy fully the requirements of federal due process. That legislation contains many provisions for notice to the taxpayer and opportunity for him to be heard: deadlines for tentative completion of assessment rolls;[25]

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[20] Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 239 (1890).

[21] Londoner v. City & County of Denver, 210 U.S. 373, 385 (1908).

[22] See Part II of this article, 25 ALBANY L. REV. 39, 41 (1961).

[23] Cases cited note 9 *supra*.

[24] Covey v. Town of Somers, 351 U.S. 141 (1956). In that case the New York foreclosure proceeding in rem was held unconstitutionally applied as against a person known by the officials of the tax district to be mentally incompetent and without the protection of a guardian, where the only notice to the incompetent was that given by publication, posting, and mailing to her residence in literal compliance with the statute.

[25] N.Y. REAL PROPERTY TAX LAW §§ 506(1), 1402. Comparable provisions for notice of assessments for public improvements are contained in various statutes. See, *e.g.*, N.Y. TOWN LAW § 239; N. Y. VILLAGE LAW § 268.

local newspaper notice of such completion in cities, towns and villages, and posting of notices in towns;[26] stated periods during which the rolls may be examined and complaints made;[27] opportunity for presenting complaints at a meeting of the board of review on grievance day;[28] special notification of assessments by mail, where demanded, of nonresidents of cities, towns and villages;[29] special notification by mail of increased assessments in towns;[30] provisions relating to hearing of grievances before the board of review;[31] newspaper publication of notice that the roll has been finally completed and that a certified copy is filed for public inspection;[32] a procedure for having grievances heard before the county board of supervisors in the event that the board of review fails to meet to hear complaints.[33] Where the assessors petition the county board of supervisors to increase a valuation or add property to the assessment roll in order to correct certain types of error, notice must be served personally upon the owner of the property affected, who is given an opportunity to be heard at a meeting of the board.[34] With respect to special franchise assessments, the tax legislation of New York contains comparable provisions for notice of tentative assessment, for hearing of complaints thereon, and for notice of final assessment.[35]

The provisions set forth in article seven of the Real Property Tax Law for judicial review of assessments on the ground of specific illegality, error by reason of overvaluation, or inequality, though generally available only to citizens who have pursued diligently their administrative remedies,[36] afford an added protection to landowners that goes well beyond the requirements of the due process clause. It seems fairly certain that the federal constitution does not require any provision in state law for judicial review of assessments where the administrative processes themselves satisfy the minimal tests outlined above.[37]

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[26] N.Y. Real Property Tax Law §§ 506, 1406. For provisions applying to any village that embraces the entire territory of any town in a county in which the town assessor or assessors are required to complete the town roll on or before June 1, see N.Y. Village Law § 328-a. That provision calls for posting as well as newspaper publication.

[27] N.Y. Real Property Tax Law §§ 506(2), (3), 1408; N.Y. Village Law § 328-a.

[28] N.Y. Real Property Tax Law §§ 506(2), 1408; N.Y. Village Law § 328-a. The board of review consists of the assessors of the unit of government involved except where another officer or body of officers is empowered to hear and determine complaints in relation to assessments, in which case that officer or body of officers constitutes the board. N.Y. Real Property Tax Law § 102(4). In villages, the board of review consists of the board of trustees and the assessors, or a committee of such board constituting at least a majority thereof and the assessors. N.Y. Real Property Tax Law § 1408.

[29] N.Y. Real Property Tax Law §§ 508, 1404. These statutes provide, however, that failure to comply with such demand shall not affect the validity of the assessment. See also N.Y. Village Law § 105-a.

[30] N.Y. Real Property Tax Law § 510. However, failure of such notice to be mailed or received is not to prevent the levy, collection and enforcement of the payment of the taxes on town property.

[31] N.Y. Real Property Tax Law §§ 512, 1408.

[32] N.Y. Real Property Tax Law § 516. The parallel provisions for filing of village assessment rolls make no reference to a certified copy. N.Y. Real Property Tax Law § 1410; N.Y. Village Law § 328-a.

[33] N.Y. Real Property Tax Law § 552.

[34] N.Y. Real Property Tax Law §§ 554, 558. The parallel provisions in the statutes governing village taxation require merely that the owner be served in the manner provided in the Village Law for service of notices. N.Y. Real Property Tax Law § 1412. Such service may be personal, by mail, or by newspaper publication. N.Y. Village Law § 330.

[35] N.Y. Real Property Tax Law §§ 608, 612, 620.

[36] N.Y. Real Property Tax Law § 706.

After general taxes have been levied, upon receipt of the tax roll and warrant the collecting officer must cause a notice that he has received such roll and warrant to be published in the official newspaper of the city, town or village once a week for two successive weeks.[38] The notice must specify one or more convenient places in the city, town or village where the collector will receive the taxes. In towns, the collecting officer must also cause the published notice to be posted on the signboard for legal notices at the entrance to the town clerk's office.[39] Newspaper notices and posting are also required in the case of school taxes.[40] Provision is made for mailing of tax bills to owners of property listed in city, town or village rolls, although the applicable statutes expressly provide that failure to mail city, town or village tax bills shall not affect the validity of the taxes.[41] Separate provisions authorize nonresidents of towns and cities to file a demand, accompanied by a fee of one dollar, with the town or city clerk for mailing of tax bills to them; the consequences of failure to comply with such demand appear to be limited to a minor restriction upon the penalty and interest that may be charged for delay in payment.[42]

In the case of real property assessed in cities or towns, the owner who is a resident of the city or town in which the property is assessed and whose name is correctly entered on the roll is personally liable for the taxes levied on the property, and the collecting officer may call on him after the delinquency date and demand payment.[43] If such a resident owner refuses to pay the tax demanded, any personal property in the county belonging to him or in his possession may be levied upon by the collecting officer and sold at auction for the purpose of paying the taxes due and the expenses of levy and sale. Public notice of the time and place of such auction must be posted in at least three public places in the city or town where the sale is to take place.[44] A cognate provision permits the recovery of village taxes by a contract action in which a warrant of attachment against the defendant's property may be granted upon application by the village under the Civil Practice Act.[45] School authorities may also sue for and recover delinquent taxes payable by any person named on the school tax roll.[46] The usual provisions for notice of a judicial action apply in such an action.

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[37] Michigan Cent. R.R. v. Powers, 201 U.S. 245 (1906); see also cases cited notes 9–19 *supra*.

[38] N.Y. Real Property Tax Law §§ 920, 1428.

[39] N.Y. Real Property Tax Law § 920. The provision for maintaining the signboard is contained in N.Y. Town Law § 30(6).

[40] N.Y. Real Property Tax Law §§ 1322, 1324, 1326(2).

[41] N.Y. Real Property Tax Law §§ 922, 1430. Bills for school taxes are to be mailed to officers or agents of certain utility corporations and to nonresident taxpayers of the school district. N.Y. Real Property Tax Law § 1322(2).

[42] N.Y. Real Property Tax Law §§ 982, 984.

[43] N.Y. Real Property Tax Law § 926. Historically, nonresident owners have not been personally liable for the property tax on the theory that the assessors' jurisdiction to value lands in their tax district does not extend to valuing them against a nonresident owner personally. Hilton v. Fonda, 86 N.Y. 339, 347 (1881). See note 4 *supra*.

The delinquency date for city and town taxes under section 926 of the Real Property Tax Law is January 31. Special charter provisions for certain cities may provide different delinquency dates. Cities having special charters are listed in 2 CCH State Tax Rep. *N.Y.* ¶ 20–002 (1960). Assessment and collection provisions of the city charters are summarized in 2 CCH State Tax Rep. *N.Y.* ¶ 71–051 (1960).

A judicial remedy is available to a county treasurer, or to a village mayor in the case of a village tax, where a tax exceeding ten dollars is returned by the proper collecting officer uncollected for want of personal property out of which to collect it. Those officers may apply to a court within a year after the return for the institution of proceedings supplementary to execution, as upon a judgment docketed in their county, for the purpose of collecting the tax and fees with interest.[47] The general rule that failure to pay property taxes is not punishable by fine or imprisonment does not apply to proceedings supplementary to execution upon a judgment recovered for taxes.[48] These provisions for enforcement of collection by court action, including supplementary proceedings, do not involve problems of notice peculiar to property taxation. From any point at which the processes of tax collection and enforcement pass into the mainstream of the judicial system, the taxpayer obtains the usual safeguards of due process, including notice and opportunity to be heard, afforded by the Civil Practice Act.

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[44] N.Y. Real Property Tax Law § 926.

[45] N.Y. Real Property Tax Law §§ 1440, 1450; N.Y. Civ. Prac. Act arts. 54–59; see also N.Y. Real Property Tax Law § 1332(5) (city school district taxes). The existing statute does not in terms confine the village's right to recover taxes by contract action to cases where the taxpayer is a resident. Under former section 126 of the Village Law, from which section 1440 of the Real Property Tax Law is derived, it was held that an in personam action by the village was available only against resident owners. Village of Massapequa Park v. Massapequa Park Villa Sites, Inc., 278 N.Y. 28, 15 N.E.2d 177 (1938). However, the basis of that decision was that section 71 of the old Tax Law provided generally that personal liability should extend to "actual inhabitants of the tax district." The present section 926 of the Real Property Tax Law, derived from section 71 of the old Tax Law, speaks in terms only of "a resident of the city or town," so that now no express general provision attaches personal liability to residents of all tax districts so as to raise an inference of intent to limit personal liability to such residents. No purpose should be inferred to remove the old immunity of nonresidents of villages from personal liability for village taxes. See N.Y. Real Property Tax Law § 1608(1). See also Kilmer, Introduction to the Real Property Tax Law, 49A McKinney's Consolidated Laws of New York Annotated xxiii, xxxii–xxxiii (1960): "This new law is in the main a restatement of the existing law and purports to make no substantive revision except minor procedural changes. . . . Changes which might be considered substantive in nature have been indicated in notes following the appropriate sections." The note following section 926 does not suggest any intention to make a substantive change creating personal liability against nonresidents for taxes outside cities and towns.

[46] N.Y. Real Property Tax Law § 1334. In view of its derivation, this statute is probably not limited in application to city school districts, although the reference to "such school tax roll" in section 1334 might at first glance be supposed to refer to the city school tax roll discussed in the immediately preceding section of the Real Property Tax Law. The possibility of application to nonresidents, discussed in connection with village taxes *supra* note 45, is present in construing section 1334. Nonresidents should not be regarded as subject to personal liability under this section despite the generality of its language.

[47] N.Y. Real Property Tax Law § 990. Again, though this statute is not in terms limited to residents, its history suggests strongly that such a limitation in its application would be correct. See N.Y. Sess. Laws 1867, ch. 361; In the Matter of Maltbie, 223 N.Y. 227, 119 N.E. 389 (1918). The internal reference in section 990 to "want of personal property out of which to collect the same" supports such a limitation, since the personal property of a nonresident was not traditionally subject to attachment for enforcement of a property tax levied against his land in the tax district. See discussion *supra* note 45.

When we turn to the enforcement of collection of delinquent taxes by administrative tax sale, we find a wealth of notice-giving procedures. Probably no single one of them is necessary insofar as the due process clause of the federal constitution is concerned. The state would have the power, incident to its right to levy taxes, to provide by statute for direct forfeiture of property on which taxes were not paid, provided, at least, that the legislation gave the taxpayer reasonable opportunity to intervene at some stage to protect his interests.[49] Because direct forfeiture statutes have rarely been enacted by the states, the minimum requirements of due process in the matter of notice and hearing under such statutes have not been delineated fully by decisions of the Supreme Court. The Court's opinion in the leading case upholding the application of a forfeiture statute indicates clearly that minimum requirements of notice and hearing may be satisfied by summary proceedings in taxation that would not suffice in cases of a judicial character.[50]

New York has never adopted a statute calling for forfeiture of tax-delinquent lands directly to the state or a municipal body. Instead, an elaborate procedure has been established for administrative sale, in which the interests of owners are safeguarded at every turn. Notice of tax sale, listing delinquent properties, must be published in official newspapers;[51] redemption rights are available to the owner for a year after the last day of the tax sale;[52] and newspaper notice of unredeemed lands must be published by the county treasurer, commencing at least three months before the end of the year allowed for redemption, listing all unredeemed lands in the county with the amounts necessary for redemption.[53] A further redemption period, which may extend as long as thirty-six months after the tax sale, is provided in the case of any parcel of real property occupied wholly or in part at the end of the ordinary redemption period.[54] An occupant or other person who applies for redemption of such occupied land is entitled to ten days' notice and a hearing before the county treasurer with reference to the question of occupancy.[55] The additional period for redemption of occupied land may be shortened by the tax grantee through service of notice to redeem upon the occupant at any time within one year after the expiration of the regular one-year redemption period.[56] Where village land is involved, a purchaser of a certificate on tax sale must serve a notice to redeem by certified or registered mail upon the record owner and upon the mortgagee, if any, of the land sold and must serve a further notice personally upon the occupant, if any, in order to become entitled to a conveyance from the village treasurer.[57] The property must be redeemed within six months from the date of service of such notice.

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[48] N.Y. REAL PROPERTY TAX LAW § 994.

[49] King v. Mullins, 171 U.S. 404 (1898); 3 AMERICAN LAW OF PROPERTY § 13.20, 543–44 (1952).

[50] King v. Mullins, *supra* note 49, at 429.

[51] N.Y. REAL PROPERTY TAX LAW §§ 1002, 1452.

[52] N.Y. REAL PROPERTY TAX LAW §§ 1010, 1456.

[53] N.Y. REAL PROPERTY TAX LAW § 1014.

[54] N.Y. REAL PROPERTY TAX LAW § 1022.

[55] N.Y. REAL PROPERTY TAX LAW § 1022(1).

Further provisions for notice to the landowner and opportunity for him to be heard during the processes of administrative enforcement are contained in the section of the law empowering a county treasurer to set aside the cancellation of a tax sale made by him, on the ground of fraud, mistake, concealment, or want of jurisdiction.[58] And where a tax district elects to sell its tax liens at a bulk tax sale, it must cause a notice listing all liens liable to be sold to be published in the official newspaper pursuant to the laws applicable to ordinary tax sales.[59]

When it appeared in the 1930's that tax titles derived through administrative sale and conveyance were proving insufficiently marketable in fact,[60] the long-established policy of affording notice and opportunity to be heard to the owner of the supposedly delinquent lands at every crucial step in the enforcement process was carried forward into nearly all the new statutes enacted to reinforce the old administrative procedures of sale and conveyance with optional judicial remedies.[61] A statute enacted in 1939 [62]

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[56] N.Y. Real Property Tax Law § 1022. The notice must state the sale and conveyance of the land, the person to whom made, the amounts required for redemption, and that unless such amounts are paid to the county treasurer or those claiming under him within six months after the time of filing of the evidence of the service of such notice, the conveyance shall become absolute and the occupant and all others forever barred from redeeming the property. A similar provision empowers a mortgagee holding a mortgage, duly recorded at the time of sale, to redeem within thirty-six months after the sale, apparently whether the mortgaged land is occupied or not. As in the case of occupied lands, the additional period for redemption may be shortened by appropriate notice given by the tax grantee. N.Y. Real Property Tax Law § 1024.

[57] N.Y. Real Property Tax Law § 1464.

[58] N.Y. Real Property Tax Law § 1028. Provision for cancellation of tax sales by the county treasurer on the ground of invalidity is contained in section 1026 of the Real Property Tax Law. This section contains no provision for notice to the purchaser of the tax certificate or tax grantee. It was originally designed to benefit a tax purchaser or grantee in case a tax sale was invalid, by enabling him to get his consideration money back by having the sale cancelled. Formerly the original owner had no standing to apply for cancellation under this section, which is derived from former section 140 of the Tax Law. In 1896, however, the statute was amended to permit application for cancellation by the owner of the lands at the time the tax sale was made. In People *ex rel.* Staples v. Sohmer, 206 N.Y. 39, 99 N.E. 156 (1912), it was held that an *ex parte* administrative cancellation under a statute approximately similar to section 1026 could not be valid as against a tax purchaser or grantee having no notice of the proceeding, and therefore the comptroller could not be required by mandamus to cancel an old tax sale since the act would have no effect on any tax purchaser's title.

[59] N.Y. Real Property Tax Law § 1046.

[60] See Part I of this article, 24 Albany L. Rev. 271, 273–79 (1960).

[61] See N.Y. Real Property Tax Law §§ 1080–1088 (action to establish regularity of tax sale); art. 11 (foreclosure of tax liens as in action to foreclose a mortgage and in rem).

The provisions of section 1072 of the Real Property Tax Law, by permitting appointment permits a tax district owning an interest in specific real property derived from a tax sale to maintain a court action to compel the determination of any claim to such property that any person makes, or might make from the appearance of the public records, other than a claim made by a civil subdivision of the state for a specific lien.[63] Notice of such an action must be afforded pursuant to court order by newspaper publication for two weeks and by mailing of the summons, complaint, order, and notice required by rule fifty-two of the Rules of Civil Practice to any defendant at his last known address.[64] Under article eleven of the Real Property Tax Law, a tax district may elect to adopt alternative procedures of judicial foreclosure of a tax lien, either as in an action to foreclose a mortgage or in rem, or both. Foreclosure as in an action to foreclose a mortgage requires observance of the appropriate procedures for notice prescribed in the Civil Practice Act and the Rules of Civil Practice; [65] in addition, before instituting such an action, the owner of a tax lien must serve a notice to redeem upon the record owner and mortgagee, if any.[66]

Foreclosure in rem by a tax district requires, in brief, filing in the county clerk's office a list of all parcels in the district delinquent for at least four years (with certain exceptions) [67] and publication of a newspaper notice for six successive weeks in two newspapers published in the tax district that tax liens on the parcels previously listed with the county clerk will be foreclosed by action in rem.[68] The enforcing officer must also cause a copy of the notice to be posted in his office, in the county court house, and in three other conspicuous places in the tax district, and must cause a copy of such notice to be mailed to the last known address of each landowner affected.[69] The constitutional sufficiency of these provisions will be examined in detail in a later part of this article.[70] At this point, it is sufficient to observe that they employ techniques of affording notice—namely, publication, posting, and mailing—that have been traditional in the New York tax collection process for well over a century. The constitutional sufficiency of such techniques under the federal due process clause has never been successfully challenged when they have been used accurately and in good faith as a basis of administrative action. It remains to be seen

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of a receiver for tax-delinquent property upon *ex parte* application to the supreme court, seems to depart from the general statutory policy in New York of giving notice of successive steps in enforcement proceedings. This section, designed to afford a remedy against "milking" of income-producing tax-delinquent properties, has been held constitutional. In the Matter of City of New York (801–815 E. New York Ave.), 290 N.Y. 236, 48 N.E.2d 502 (1943); *In re* Section 14, Block 4367, Lot 1, 117 N.Y.S.2d 36 (Sup. Ct. 1952).

[62] N.Y. REAL PROPERTY TAX LAW §§ 1080–1088, derived from N.Y. Sess. Laws 1939, ch. 773.

[63] N.Y. REAL PROPERTY TAX LAW § 1084.

[64] N.Y. REAL PROPERTY TAX LAW § 1086.

[65] N.Y. REAL PROPERTY TAX LAW § 1116.

[66] N.Y. REAL PROPERTY TAX LAW § 1110.

[67] N.Y. REAL PROPERTY TAX LAW § 1122.

[68] N.Y. REAL PROPERTY TAX LAW § 1124.

[69] N.Y. REAL PROPERTY TAX LAW § 1124(2).

[70] On the constitutionality of in rem tax foreclosure generally, see LEWIS & BYRD, IN REM PROPERTY TAX FORECLOSURE 10–29 (Institute of Gov't, Univ. of N.C. 1959).

whether they may form a valid basis for judicial proceedings supplementary to the administrative process.

Despite the generous number of notificatory procedures that are woven into the New York system of property taxation, it remains possible for a property owner, through his own carelessness or neglect or that of his agent, to lose his land by nonpayment of taxes and never become actually aware of the various steps being taken by officials to enforce collection with resulting threat to his title. Certain general observations of Professor Merrill about constitutionally permissible methods of notification seem pertinent here:

> The hallowing effect of time seems the chief factor in judicial willingness to accede to the employment of methods which can be regarded as likely actually to result in knowledge only upon the assumption that the noticee, exercising the highest degree of care to determine whether any monition has been given, will carry his search into the highways and byways. Another factor, no doubt, is the expedition of public business resultant upon sustaining such arrangements.
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> Thus it comes about that public posting, eminently inefficient as a source of information under modern conditions, is accepted as consistent with due process of law in drainage, paving, and irrigation proceedings. Publication, a whit more dependable, but still a very precarious way of spreading the news, has received judicial approval in numerous instances, including: special assessment proceedings; proceedings to organize irrigation or drainage districts; the assessment, equalization, and enforcement of taxes; eminent domain proceedings; land registration proceedings; and the process of administrative tribunals.[71] (Footnotes omitted.)

Normally only persons who are already mindful that they have failed to pay taxes will search the published notices of tax sale or notices to redeem for the specific purpose of finding out whether their own property is listed as delinquent, particularly in the long and confusing lists published in some of the more populous communities. Hence such publication is unlikely to alert the owner who has failed to pay his property taxes and has forgotten that he has failed to do so. Illiterate persons or those who use only a foreign language are also less likely to obtain warning as a result of newspaper publication than they would be from personal service of a notice of delinquency. Yet publication of delinquency lists can hardly be classed as a useless formality since the very appearance of the notice in the newspapers serves to remind landowners of ordinary intelligence and literacy who failed to pay their taxes in the first place merely through carelessness or procrastination that they are in default. Whether the purpose of merely reminding such a category of delinquent owners could be achieved by a less expensive method than one requiring repeated publication of many pages of newsprint is an interesting question. One thing is clear, however: that the traditional statutory procedures for newspaper publication, either alone or in combination with posting or mailing of notice, suffice constitutionally as a basis for *administrative* jurisdiction to enforce collection of delinquent property taxes, regardless of whether the landowner thereby acquires actual knowledge that official action affecting his interests is impending.

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[71] 1 MERRILL, NOTICE § 518 (1952). In the matter of adequacy of notice in administrative proceedings, see generally GELLHORN & BYSE, CASES ON ADMINISTRATIVE LAW ch. 7, especially at pp. 852–59 (4th ed. 1960).

Until the enactment of curative legislation late in the nineteenth century, one of the most frequently recurring problems confronting the New York courts in property tax cases was that of determining the effect of official deviation from the numerous notificatory procedures set up in the general and local tax laws and in divers legislative arrangements governing the levy and collection of special improvement assessments. A subsidiary problem, not even yet clearly resolved, was the effect of a showing that the landowner had actual knowledge of the imminence of administrative action adverse to his interests where official deviation from such procedures had in fact occurred. We shall find, in general, that the courts adopted the view at an early stage that notificatory procedures were established for the security of the taxpayer—regardless of whether they were likely as a practical matter to result in his taking measures to protect his interests in the individual case—and hence that statutory provisions calling for official acts having a possible notifying effect were to be treated as mandatory unless they indicated clearly a purpose to the contrary. In the absence of legislation clearly indicating otherwise, the officials concerned had to follow notificatory procedures accurately under pain of nullity of all proceedings subsequent to a deviation. It is not too gross an oversimplification to say that although the landowners generally lost their battles over due process in the Supreme Court of the United States, they won their war in the state courts on issues of statutory construction, holding tax officials to close compliance with all procedures designed to afford notice.

The New York courts have manifested no disposition to insist upon more stringent requirements of notice and hearing in the administrative processes of property taxation, so far as the state constitution is concerned, than the Supreme Court of the United States has outlined as necessary for compliance with the due process clause of the federal constitution.[72] Although the general property tax legislation of New York has contained from the outset sufficient provisions for notice and hearing to be proof against constitutional attack, such has not always been the case with state or municipal legislation regulating assessments for local improvements. Well before the Supreme Court elaborated the standard of due process in this area, the New York Court of Appeals had held invalid, as made without due process of law, a street improvement assessment levied locally pursuant to state legislation that provided no procedure for notice to an owner of assessed land or opportunity for him to be heard on the correctness or amount of the assessment.[73] As in the case of general tax legislation, however, the court of appeals has upheld statutes that provided for notice of improvement assessments in rather attenuated form. In *Matter of Common Council of Amsterdam,*[74] a statutory arrangement was held adequate under which the only notice to the landowner of his liability for a street assessment was a provision of the city charter itself, giving the city power to assess lots anywhere in the city for benefits deemed to accrue from the improvement. The charter required the city to publish notice of its determination to make the improvement and take lands necessary therefor and permitted an owner of land taken to apply to the supreme court at a specified time and place for appointment of commissioners. Persons filing claims for damages from the taking had a right to appear before the commissioners and be heard. After their appointment, the commissioners were directed to publish a notice of the time and place where they would meet to ascertain and assess damages. After meeting and making the award for damages, the commissioners were authorized to assess the expense upon the real estate benefited. After the commissioners acted to appraise damages and assess for benefits, they were required to file a report with the city clerk. They were then required to publish for two successive weeks in the official city newspaper a notice that their report had been filed with the city clerk and might be examined by interested parties, that the report would be presented to the supreme or county court for confirmation, and that all persons desiring to object to the report should file their objections in writing with the clerk before the day specified in the notice. On the day appointed, the court was to "hear the parties in regard to said report" and confirm or annul it. As a practical matter, an owner of land somewhat remote from the area of the improvement might not be alert enough to recognize that the published notice of the commissioners' meeting related to a matter affecting his property interests. However, the court regarded the arrangement as satisfying the requirement of due process of law, distinguishing an earlier case in which the whole system of assessing water rates in Brooklyn had been declared unconstitutional because of lack of procedure for notice of the prescribed hearing before the board of water commissioners that finally assessed the rates.[75] The Amsterdam charter was different, said the court, because of the hearing it provided before the supreme court, by whose action alone the "tax" was effectually imposed.[76]

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[72] See, *e.g.*, In the Matter of City of New York (801–815 E. New York Ave.), 290 N.Y. 236, 48 N.E.2d 502 (1943); Floyd-Jones v. Town Board, 249 N.Y. 398, 164 N.E. 330 (1928); In the Matter of Common Council of Amsterdam, 126 N.Y. 158, 27 N.E. 272 (1891); Spencer v. Merchant, 100 N.Y. 585, 3 N.E. 682 (1885), *aff'd*, 125 U.S. 345 (1888).

[73] Stuart v. Palmer, 74 N.Y. 183, 30 Am. Rep. 289 (1878). Incidentally, in the course of its opinion in the *Stuart* case, the court said, *obiter:* "It is not enough that the owners may

In the matter of a constitutional right to notice and hearing, the improvement assessment cases in New York have thus aligned themselves in a manner closely similar to that of the decisions of the United States Supreme Court discussed earlier: one line of cases holding such assessments invalid

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by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard." *Id.* at 188, 30 Am. Rep. at 291–92.

[74] 126 N.Y. 158, 27 N.E. 272 (1891).

[75] Remsen v. Wheeler, 105 N.Y. 573, 12 N.E. 564 (1887). The constitutional issue arose only collaterally in the *Remsen* case, which was an action for restitution under a land contract, but it seems that the court could not have avoided deciding the issue on the appeal.

[76] 126 N.Y. at 164, 27 N.E. at 274.

in the total absence of provision for notice and effective hearing,[77] the other upholding official acts done pursuant to legislation containing provisions for such notice and hearing even where those provisions do not call for personal notice and where the probability is not high that actual notice will reach the landowner if they are complied with.[78] The differentiation in the New York cases has undoubtedly been reinforced by the parallel alignment of the federal tax and assessment cases discussed above.[79]

Prior in time to the assessment and levy of any tax are the resolutions of the state legislature or authorized municipal legislative body purporting to provide for raising of the tax.[80] A tax deed ultimately given in the enforce-

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[77] People *ex rel.* Am. Exch. Nat'l Bank v. Purdy, 196 N.Y. 270, 89 N.E. 838 (1909); People *ex rel.* Moller v. O'Donnel, 183 N.Y. 9, 75 N.E. 540 (1905); In the Matter of Trustees of Union College, 129 N.Y. 308, 29 N.E. 460 (1891); McLaughlin v. Miller, 124 N.Y. 510, 26 N.E. 1104 (1891); Remsen v. Wheeler, 105 N.Y. 573, 12 N.E. 564 (1887); Stuart v. Palmer, 74 N.Y. 183, 30 Am. Rep. 289 (1878); *cf.* People *ex rel.* Bridgeport Sav. Bank v. Feitner, 191 N.Y. 88, 83 N.E. 592 (1908); People *ex rel.* Simpson v. Wells, 181 N.Y. 252, 73 N.E. 1025 (1905); Nehasane Park Ass'n v. Lloyd, 167 N.Y. 431, 60 N.E. 741 (1901).

[78] See cases cited note 72 *supra.*

[79] See, *e.g.,* In the Matter of City of New York (801–815 E. New York Ave.), 290 N.Y. 236, 240–41, 48 N.E.2d 502, 504 (1943), citing federal and New York cases indiscriminately.

[80] The state legislature itself may levy property taxes. Thus it has the power to levy, by authorizing reassessment, a property tax that was invalidly assessed and levied by a municipality the year before. Howell v. City of Buffalo, 37 N.Y. 267 (1867). However, it may not thereby validate retroactively an attempted tax sale made under the original invalid tax. People v. Inman, 197 N.Y. 200, 90 N.E. 438 (1910); Ravensdale Holding Co. v. Village of Hastings, 156 Misc. 777, 281 N.Y. Supp. 913 (1935). Under the present law in New York, except as otherwise provided by special acts, property taxes are levied by each county board of supervisors to pay for anticipated net state, county and town charges as budgeted. N.Y. REAL PROPERTY TAX LAW § 900; N.Y. COUNTY LAW §§ 218(1), 355, 359, 360, 361. Town boards do not ordinarily levy taxes, the town budget being referred, after adoption by the town board, to the county board of supervisors for levy of net town charges as budgeted by the town. N.Y. TOWN LAW §§ 111–116 (preparation of budget), 181 (fire district expenses), 191-(a) (cost of sewer, drainage and water district planning), 198(1)(k) (unpaid sewer charges), 198(3)(d) (water rates), 198(6) (lighting district expenses), 202-a (1), (6) (expenses of maintenance of public improvements), 231-a (cost of district improvements), 232 (cost of certain public improvements); N.Y. GENERAL MUNICIPAL LAW § 120-t (expenses of joint water districts of towns and villages). Although the county board normally levies the state, county and town tax, the assessment roll is prepared in the towns by town assessors. N.Y. TOWN LAW § 33; N.Y. REAL PROPERTY TAX LAW § 506.

Boards of trustees of villages have the power of levying taxes to meet net village expenses as budgeted. N.Y. REAL PROPERTY TAX LAW § 1420; N.Y. VILLAGE LAW § 109. The village board may by resolution authorize the village assessors to use the current year's assessment roll of the county or town as the basis for the assessment as far as practicable. N.Y. REAL PROPERTY TAX LAW § 1402. In New York City the council is charged with responsibility for raising by taxation the amounts necessary to meet the annual budget. N.Y. CITY CHARTER § 169. The amount that may be raised by tax on real estate in New York City is limited by section 3-b of the General Municipal Law. The common council of a city of the second class has the power to levy property taxes for estimated net annual charges of the city. N.Y. SECOND CLASS CITIES LAW §§ 77, 100. Cities generally have the power to levy and collect property taxes "for any public or municipal purpose." N.Y. GENERAL CITY LAW § 20(4). A city of the third class may levy for the cost of certain contracts entered into for an improved system of street lighting. N.Y. GENERAL CITY LAW ment of a delinquent tax or improvement assessment may be successfully attacked on the ground that the act or resolution purporting to lay or authorize the tax or assessment is unconstitutional or illegal.[81] But there appears to be no authority in New York stating a general constitutional necessity for a form of notice to precede any meeting of a legislative body at which expenditures are authorized or taxes are voted.[82] It is true that under former statutes expressly prohibiting a municipality from passing a resolution involving the taxing or assessing of the citizens until after publication of the resolution, the court of appeals held in several cases that the publication provision was mandatory and that special assessments levied pursuant to resolutions not so published were void.[83] But in the absence of an express prohibition of that sort, there appears to be no authority in the New York cases for the proposition that mere omission to give notice, directed by statute, of a meeting of a municipal body will invalidate property taxes voted or levied at the meeting.[84]

Regular meetings of the legislature or of municipal bodies having the power to levy taxes, such as county boards of supervisors, and city, village and school district boards, are usually required to be held at stated intervals or specified times. The courts have not taken the position that failure to

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§ 18-c. Certain types of school districts have the power to raise taxes for specified school purposes. N.Y. Education Law §§ 1604 (boards of trustees of common school districts), 1709 (boards of education of union free school districts), 1804 (boards of education of central school districts), 2021–22 (voters duly assembled in any district meeting authorizing levy). The school tax is technically levied by the "school authorities" of the district. N.Y. Real Property Tax Law § 1306. Ordinarily the valuations used for collection of school taxes are ascertained from the latest final assessment roll of the city or town. N.Y. Real Property Tax Law § 1302. For any county adopting an optional form of government under the Optional County Government Law, all school taxes would be levied on the town or city tax roll. N.Y. Optional County Government Law § 311. See also N.Y. Rapid Transit Law § 34(e), providing for a levy for certain purposes by the board of assessors of a city of over one million inhabitants. The New York constitution contains limitations on the amount to be raised by tax on real estate in any fiscal year in any described county, city, village, or school district. N.Y. Const. art. 8, §§ 10–12.

[81] People v. Inman, 197 N.Y. 200, 90 N.E. 438 (1910); Wallace v. McEchron, 176 N.Y. 424, 68 N.E. 663 (1903); Cromwell v. MacLean, 123 N.Y. 474, 25 N.E. 932 (1890); Matter of Woolsey, 95 N.Y. 135, 144 (1884) (dictum).

[82] In the Matter of Common Council of Amsterdam, 126 N.Y. 158, 27 N.E. 272 (1891); Spencer v. Merchant, 100 N.Y. 585, 3 N.E. 682 (1885), *aff'd*, 125 U.S. 345 (1888); In the Matter of DePeyster, 80 N.Y. 565 (1880). See generally 1 Cooley, Taxation 570 (3d ed. 1903), adopting the position that sufficient notice of regular meetings of legislative bodies is afforded by the statutory provisions requiring them to be held.

[83] In the Matter of Phillips, 60 N.Y. 16 (1875); In the Matter of Astor, 50 N.Y. 363 (1872); In re Douglass, 46 N.Y. 42 (1871). The invalidation of the assessments in the *Douglass* case indicated that millions of dollars' worth of improvement assessments in the city of New York were void because of an error in the choice of newspapers for advertising the contemplated resolutions. That decision led to the enactment of an "arrearage act," N.Y. Sess. Laws 1872, ch. 580. Section 7 of that act provided that no assessment theretofore or thereafter made for local improvements should be vacated or set aside for omissions to advertise any ordinance or resolution authorizing the improvement or work for which the assessment was made. See Lennon v. The Mayor, 55 N.Y. 361, 364 (1874).

[84] See In the Matter of Common Council of Amsterdam, 126 N.Y. 158, 27 N.E. 272 (1891).

give notice of such a legislative meeting regularly held at the time designated by statute will invalidate a tax voted or levied thereat, statutory provisions for publication of notice of such a regular meeting being regarded as directory rather than mandatory.[85] Perhaps special meetings stand on a different

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[85] See generally 1 COOLEY, TAXATION 570 (3d ed. 1903). Where the meeting is one of a municipal body that acts in an adjudicative capacity in the taxing process, there is some authority to support the proposition that a published notice prescribed by statute must be given although the date of such meeting is also prescribed by statute. The requirement of publication of notice of the hearing on grievances by a board of review, now contained in section 506 of the Real Property Tax Law, was originally held to be mandatory. Jewell v. Van Steenburgh, 58 N.Y. 85 (1874); Wheeler v. Mills, 40 Barb. 644 (N.Y. Sup. Ct. 1863); see Bruecher v. Village of Port Chester, 101 N.Y. 240, 4 N.E. 272 (1886); Merritt v. Village of Portchester, 71 N.Y. 309, 27 Am. Rep. 47 (1877). The authority of those decisions for the proposition that failure to publish notice of the hearing of grievances is a jurisdictional defect invalidating the subsequent tax, was somewhat shaken by People v. Turner, 117 N.Y. 227, 22 N.E. 1022 (1889) and People v. Turner, 145 N.Y. 451, 40 N.E. 400 (1895). In the first of the *Turner* cases, the court took the position that although the omission of the assessors to hold a grievance hearing and give the prescribed notice therefor was "jurisdictional" in a proceeding between the owner and anyone claiming rights in the property under a tax sale, it was a defect that could be remedied retrospectively by curative legislation. The principal basis for the court's decision on this matter appeared in the following passage of the opinion (117 N.Y. at 237–38, 22 N.E. at 1025):

> The notice required by this act, it will be observed, is not personal or of an absolute character, but is constructive, and the provision for a hearing of the taxpayers by the assessors, is of the most informal and indefinite character. It doubtless gives the taxpayer the right to appear before the assessors, at the time stated, and endeavor to persuade them to modify or abate his assessment. He may attempt to swear off his assessment for personal property, but beyond this a hearing does not seem to give him any legal rights, or a denial of such hearing inflict any absolute legal damage. Section 5, chapter 176 of the Laws of 1851, provides that in case of the neglect of the assessors to meet for review, as required by the statute, any person aggrieved by an assessment may appeal to the board of supervisors at their next annual meeting, who shall have power to review and correct such assessment. The consequences of an omission by the assessors to hold the meeting are thus expressly declared, and would seem to deprive such omission of any other effect than that given to it by this statute. Ample opportunity is thereby given the taxpayer, if he feels aggrieved in respect to assessments of his property, to be heard before the board of supervisors, who are vested with full power to afford all and any relief which was possessed by the assessors. The taxpayer must be presumed to have knowledge of the provisions of public statutes; and as the time and place for the meetings of the boards of supervisors are fixed by statute and occur at stated periods, we must presume that the legislature intended such notice of the time and place for the hearing of dissatisfied taxpayers to be adequate notice of the opportunity to be heard.

It is hard to see why the foregoing reasoning does not undercut the *Jewell* and *Wheeler* decisions themselves, but the court purported merely to distinguish them without disapproval. The same statute specifying the effect of failure of the board of review (which is still in effect, in amended form, in section 552 of the Real Property Tax Law) was in force when both the *Jewell* and *Wheeler* cases were decided. It is not surprising, therefore, to find the court saying in the second *Turner* case that the same defects, termed "jurisdictional" in the first *Turner* opinion, had been merely "irregularities" (145 N.Y. at 457, 40 N.E. at 402), thus rendering doubtful the authority of the earlier cases holding otherwise. The rule of the earlier cases was later reaffirmed, however, in Second Nat'l Bank v. City of New York, 213 N.Y. 457, 107 N.E. 1039 (1915), in which the court of appeals again characterized as "jurisdictional" the omission of assessors to publish a notice of completion of assessments and afford the taxpayer an opportunity to be heard thereon, and permitted the taxpayer to recover his payments under the "void" assessment as made under duress. The court held that the taxpayer was not required to seek relief by applying to a reviewing board or bringing certiorari proceedings. The holding in the first *Turner* case on the effect of curative legislafooting. Judge Cooley once stated that there must be careful compliance with all regulations providing for legal notice of such meetings,[86] but the effect on the validity of a tax voted at a special meeting where notice provisions are not complied with is not clear under the New York decisions. There seems to be no authority, for example, indicating what the consequences would be of a failure of a county board of supervisors to publish the required notice of a public hearing on the tentative county budget,[87] which forms the basis for the county board's ultimate resolution to raise taxes to meet the appropriations called for by the budget as adopted.[88] With respect to any school district meeting, a statute expressly provides that proceedings are not to be held illegal for want of due notice to all persons qualified to vote at the meeting, unless it appears that the omission to give such notice was wilful and fraudulent.[89] The commissioner of education of New York has applied that provision as a basis for sustaining the validity of proceedings in district meetings in a considerable number of cases.[90] If the commissioner should ever decide in a case before him that notice had been wilfully or fraudulently withheld, he should have no difficulty in declaring the proceedings at the meeting in question invalid by inference from the condition contained in the statutory provision.

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tion upon such a defect was not in issue in the *Second Nat'l Bank* case. The resulting complications will be discussed in Part 4 of this article.

The rule usually followed in the United States seems to be that if a statute specifies the day and place where the board of review is to meet, a person affected by its decisions may not successfully attack its proceedings for want of notice. BLACK, TAX TITLES § 131 (2d ed. 1893). Section 506 of the Real Property Tax Law, which specifies the second Tuesday in July as grievance day, leaves discretion to the board of review as to the place of hearing. It is therefore doubtful whether the general rule that Black sets forth is applicable under the general tax statute in New York. At the time the *Jewell* and *Wheeler* cases were decided, the tax law of New York specified a date (the third Tuesday in August) for grievance day. See 1 N.Y. Rev. Stat. ch. 13, tit. 2, art. 2, § 20, as amended by N.Y. Sess. Laws 1851, ch. 176, § 4.

[86] 1 COOLEY, *op. cit. supra* note 85, at 571–73.

[87] N.Y. COUNTY LAW § 359.

[88] N.Y. COUNTY LAW § 360.

[89] N.Y. EDUCATION LAW § 2010.

[90] See, *e.g.*, Matter of Hyatt, 77 St. Dep't 3 (N.Y. Educ. Dep't 1956); Matter of Fontana, 77 St. Dep't 121 (N.Y. Educ. Dep't 1956); Matter of Birmingham, 74 St. Dep't 32 (N.Y. Educ. Dep't 1953). The New York supreme court once enjoined the issuance of schoolhouse bonds pursuant to a vote taken at a district meeting the only notice of which had been a sign posted at three places in the district. Austin v. School Dist. No. 5, 68 Misc. 538, 125 N.Y. Supp. 222 (1910). It has since been held, however, that the commissioner of education has exclusive power to hear and determine the question of the validity of the acts of a school district meeting where the sufficiency of notice of the meeting is in issue. His decision, if arbitrary or capricious, is subject to judicial review. Beam v. Wilson, 279 App. Div. 277, 110 N.Y.S.2d 94 (1952). *Contra,* Botens v. Board of Education, 204 N.Y.S.2d 266 (Sup. Ct. 1960); *cf.* O'Connor v. Emerson, 196 App. Div. 807, 188 N.Y. Supp. 236, *aff'd,* 232 N.Y. 561, 134 N.E. 572 (1921). The commissioner has ruled almost invariably in favor of the sufficiency of the notice where a substantial number of voters appear at the meeting. See, *e.g.*, Matter of District No. 7, 70 St. Dep't 40 (N.Y. Educ. Dep't 1949). On the reviewability of the commissioner's decisions generally, see Application of Kuhn, 1 App. Div. 2d 533, 152 N.Y.S.2d 813 (1956), *appeal dismissed,* 2 N.Y.2d 749, 138 N.E.2d 742, 157 N.Y.S.2d 383 (1957).

In contrast with cases in which the issue has been the sufficiency of notice of meetings, essentially legislative in purpose, at which action is taken to vote or levy a tax, cases passing on the effect of official noncompliance with statutory provisions for notice in the process of assessment and collection have applied strict standards. Thus, the procedure for notice and hearing of grievances by the local board of review has been regarded as mandatory; noncompliance therewith invalidates the assessment and resulting tax, at least to the extent that no curative statute comes into play.[91] Municipal officials who seize the resident owner's personal property in enforcement of such a tax have been held personally liable in trespass.[92] A tax title derived from nonpayment of a tax so assessed was regarded as invalid before the advent of curative legislation.[93] Furthermore, after completion of the roll, assessors have been regarded as having no jurisdiction to change the persons or property assessed or the adjudged valuation, except upon complaint of the party assessed.[94]

The rule requiring strict compliance with notificatory provisions is not confined to situations in which tax officials are acting in an adjudicative capacity. Advertisement of a tax sale must be made precisely within the period and in the class of newspapers designated by the applicable tax statute.[95] A tax title is originally invalid where notice of the tax sale upon which it depends is not continued before sale for a period of forty-two days, even though the notice has been published once a week for six successive weeks.[96] Although no modern case appears to have passed upon the effect of publication of notice of sale in newspapers other than those of a class specified by the applicable statutes,[97] it seems probable that such defective publication would result in invalidity of the sale.[98] On the other hand, notice of a tax sale may be validly published in a supplement to the designated official newspaper rather than in the body thereof.[99]

The importance attached to strict official compliance with provisions of the tax law designed to notify the taxpayer of his potential liabilities is illustrated by a series of decisions holding tax assessments, sales and conveyances invalid for inaccuracy of description of the property affected. An early leading case, *Cruger v. Dougherty,*[100] involved a special statute authorizing an assessment against persons entitled to receive rents reserved on leases in fee, on the amounts thereof, as personal property. An assessment was made under the statute against "John Kortright and others, legal heirs of John Kortright, . . . deceased, or their heirs or assigns, for rents reserved in the town of Kortright . . . subject to taxation . . ." John Kortright had been dead for many years when the assessment was made. Upon this assessment, the county supervisors levied a tax against owners of those leases who claimed to be the heirs of John Kortright. The plaintiff, who was one of those heirs, refused to pay the tax upon demand, and eventually her interest in one of the leased lots was sold in enforcement of the tax. She never redeemed. When she brought ejectment against a purchaser of the tax title, the defendant offered to prove that the assessors had made diligent inquiry, apparently without success, to ascertain the names of the owners of the rents reserved upon the Kortright patent and had assessed them according to the best information they could obtain. The trial court excluded such evidence, ruling that the assessment roll must stand on its own foundation, and directed a verdict for plaintiff on the ground that the assessment was void. In his argument on appeal, counsel for defendant argued that in a review of proceedings before boards of assessors, "which are usually composed of unlearned men," their acts, "constituting as they do, part of the legal arrangements for carrying on the government and providing for its revenues," should be liberally construed with a view to preventing a failure of the purposes for which such boards were created.[101] Rejecting that argument, the court of appeals affirmed the decision below on the ground of noncompliance by the assessors with several provisions of the applicable statute. One irregularity held fatal was that the assessment had been made in gross for all the rents reserved in the whole patent, instead of by separate specification of each rent. The identification of the taxpayers as "legal heirs of John Kortright" was considered insufficient for purposes of a personal property tax like the one in question. On that point, the court distinguished an earlier case in which a school tax assessment against "the widow and heirs of Zopher S. Wheeler, deceased," as owners and occupants of a farm, had been held formally sufficient.[102] Writing for the court in the *Cruger* case, Judge Peckham remarked that while perhaps it may not be necessary for the persons taxed to be named literally in all cases, they should be as distinctly identified as if named.[103] The court stressed certain peculiarities of the personal property tax, such as the right of the taxpayer to "swear off" the tax on account of debts that he might owe, which rendered inexpedient the assessment of tenants in common of personal property as a group. The court was unimpressed by the fact that the taxpayer had paid taxes levied upon assessments made in that same form for each of the preceding eighteen years, observing: "One might almost as well defend an action for an assault and battery, by pleading that he had beaten the plaintiff every year for many years, and that this was the first time the plaintiff had ever complained." [104]

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[91] See note 85 *supra.*

[92] Jewell v. Van Steenburgh, 58 N.Y. 85 (1874).

[93] Wheeler v. Mills, 40 Barb. 644 (N.Y. Sup. Ct. 1863).

[94] People *ex rel.* Chamberlain v. Forrest, 96 N.Y. 544 (1884); Overing v. Foote, 65 N.Y. 263 (1875); Clark v. Norton, 49 N.Y. 243 (1872). In the *Forrest* case, the assessors undertook to correct a typographical error, thereby increasing the plaintiff's assessment from $4,000. to $40,000. *Held,* they had no jurisdiction to make such a change without notice after completion of the roll although the error was plainly of a clerical nature.

[95] Olds v. City of Jamestown, 280 N.Y. 281, 20 N.E.2d 756 (1939). The defect is not remedied by a curative statute. *Ibid.*

[96] Stevens v. Breen, 258 App. Div. 423, 16 N.Y.S.2d 909, *aff'd,* 283 N.Y. 196, 27 N.E.2d 987 (1940). The appellate division relied upon Olds v. City of Jamestown, *supra* note 95, which involved a local statute, and Market Nat'l Bank v. Pacific Nat'l Bank, 89 N.Y. 397 (1882), which involved the period for service of summons by publication under the Code of Civil Procedure. Two older decisions of the court of appeals had been *contra* under a differently worded statute: Wood v. Morehouse, 45 N.Y. 368 (1871); Olcott v. Robinson, 21 N.Y. 150, 78 Am. Dec. 126 (1860).

[97] See N.Y. Real Property Tax Law §§ 1002, 1452.

[98] *Cf.* In the Matter of Burke, 62 N.Y. 224 (1875); In the Matter of Anderson, 60 N.Y. 457 (1875).

[99] Morton v. Horton, 189 N.Y. 398, 82 N.E. 429 (1907).

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[100] 43 N.Y. 107 (1870).

[101] *Id.* at 113.

[102] Wheeler v. Anthony, 10 Wend. 346 (N.Y. Sup. Ct. 1833).

[103] 43 N.Y. at 119.

The insistence of the court in the *Cruger* case upon accuracy of the assessment rolls in the description of the property assessed and in identification of the person assessed had been foreshadowed by *Tallman v. White*.[105] In that case a tax title to a parcel of land in Syracuse was defeated by a showing that the assessment roll, the return to the comptroller, and the comptroller's deed had each described the premises in question correctly by lot number and identity of adjacent lands but had described them as located "in the village of Lodi," whereas Lodi had never been incorporated as a village but was the popular designation of an area then forming part of Syracuse. It appeared that there was a tract called "Lodi" about three-quarters of a mile distant from the premises in question, but that there was no lot or block in the Lodi tract to which the boundaries and description in the assessment roll, return, and comptroller's deed could be applied. A directed verdict for the original owner in ejectment against the tax grantee was upheld, the court reasoning that an accurate designation of the land assessed is essential to the validity of an assessment because later the owner must be apprised that his land has been advertised for sale or redemption in order that he may be able to save it by paying the tax. The descriptions in the advertisements of sale and of redemption were taken from entries in the comptroller's books, transcribed from the assessment rolls. Hence, an error of description in the assessment "runs through the whole proceeding." [106] If the error "might probably mislead" the owner and prevent him from ascertaining by the notices that his land was to be sold or redeemed, he would be deprived of an opportunity of preventing the sale by paying the tax.[107] As in the *Cruger* case, the fact that the owner had not been actually misled was treated as irrelevant.

The strict view of the *Tallman* and *Cruger* cases was followed in a series of cases, now obsolete, holding assessments invalid where occupied lands owned by a nonresident were erroneously assessed against the nonresident [108] or as "nonresident lands" [109] instead of against the occupant as prescribed, and where land was assessed as nonresident when a resident owned an undivided interest in it.[110] Also, where a statute required the assessors to state separately the value of each parcel assessed, it was a fatal error to assess as one parcel a lot that had been subdivided into two lots though both lots were owned by the same person and the ward map to which assessments were supposed to refer still showed the parcel as one lot.[111] And as recently as 1950 it was said by the appellate division of the supreme court that an assessment based on units of land other than those prescribed by statute would be jurisdictionally void and that the purchaser at a subsequent tax sale based on such assessment would take no title thereunder.[112]

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[104] *Id.* at 120.

[105] 2 N.Y. 66 (1848), discussed in Part I of this article in connection with the problem of the evidentiary standing of the comptroller's deed. 24 ALBANY L. REV. 271, at 309–10. See also Dike v. Lewis, 2 Barb. 344 (N.Y. Sup. Ct. 1848), holding invalid an assessment and sale of a lot referred to on the roll as number 228 when in fact it was 227. The boundaries of the lot had been correctly described and the tract in which it was located had been correctly designated.

[106] 2 N.Y. at 71.

[107] *Ibid.*

[108] Stewart v. Crysler, 100 N.Y. 378, 3 N.E. 471 (1885).

[109] Joslyn v. Rockwell, 128 N.Y. 334, 28 N.E. 604 (1891).

[110] Clark v. Kirkland, 133 App. Div. 826, 118 N.Y. Supp. 315 (1909), *aff'd,* 202 N.Y. 573, 96 N.E. 1112 (1911).

In the matter of the accuracy of the assessment rolls in describing the property taxed and identifying the person against whom the assessment is made, the legislature finally moved to modify the strict decisional law. In 1902, legislation was enacted to the effect that an error in the name of the owner or occupant or the assessment of a parcel to the name of a deceased person or to his estate should not invalidate an assessment or the tax levied thereon.[113] In 1911, it was further enacted that an error in the description of the parcel taxed should not invalidate the assessment against such parcel if the description was sufficiently accurate to identify it; also that the entry of the name of the owner should be regarded not as part of the assessment but merely as an aid to identify the parcel upon the roll.[114] Those provisions have been carried forward, somewhat amended, into the modern Real Property Tax Law, the test of adequacy of description now being whether the parcel can be "identified and located with reasonable certainty." [115]

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[111] May v. Traphagen, 139 N.Y. 478, 34 N.E. 1064 (1893). That case involved a gross sale under Brooklyn charter provisions, made before section 11 of title 10 of N.Y. Sess. Laws 1888, ch. 583, became effective to permit apportionment of gross assessments where more than one person had an interest in the parcel assessed. See also People *ex rel.* Brooklyn Union Gas Co. v. Miller, 172 Misc. 169, 14 N.Y.S.2d 444 (1939), *aff'd,* 258 App. Div. 1066, 17 N.Y.S.2d 1022 (1940), where it was held in a certiorari proceeding that since the Greater New York Charter did not authorize assessment of separate parcels of land in gross, the tax commissioners had no authority to levy a bulk assessment against seventeen lots on the ground that they were physically connected and used as a unit for gas manufacturing.

[112] Griffin v. Lamport Realty Co., 276 App. Div. 1103, 96 N.Y.S.2d 732 (1950), *aff'd,* 302 N.Y. 728, 98 N.E.2d 703 (1951). The original owner of subdivision lots asserted that the tax sale was invalid since the premises, consisting of hundreds of lots, had been assessed in individual lots instead of in bulk after the subdivision had been adandoned. He claimed to have filed a certificate of abandonment of the subdivision and mailed a copy of the certificate to the town board of assessors as required in order to become assessable for the tract in gross under N.Y. Tax Law § 32 (now N.Y. Real Property Tax Law § 560). The appellate division found no sufficient proof that he had filed the copy of the certificate with the assessors and hence held that the assessment of the lots individually had been correct and valid.

[113] N.Y. Sess. Laws 1902, ch. 171, § 2.

[114] N.Y. Sess. Laws 1911, ch. 315, § 6, amended N.Y. Sess. Laws 1916, ch. 323, § 29, formerly New York Tax Law § 55-a.

[115] N.Y. REAL PROPERTY TAX LAW § 504(4). The county board of supervisors is expressly given the power to make certain corrections in the assessment rolls and to make such changes in property descriptions as are necessary to make them sufficiently definite. N.Y. REAL PROPERTY TAX LAW § 556(1). A mistake in the name of the owner of a parcel of land is not to affect the validity of a levy of a school tax against the parcel. N.Y. REAL PROPERTY TAX LAW § 1308.

The courts seem to have applied the statute without great difficulty.[116] Dictum in a case decided in 1952 suggests that whether the taxpayer has been misled in fact by an erroneous description of the premises may be relevant in determining the sufficiency of the description; the court intimated that payments by the same taxpayer under the same form of assessment in prior years might be shown to establish that he was not misled in the year in question.[117] That suggestion—supported, to be sure, by the peculiarly indefinite language of the statutory provision under consideration—represents a departure from the orthodox view that it is immaterial whether the landowner has been prejudiced in fact by an error in the assessment. The orthodox view, illustrated by the *Cruger* case, was that if a prescribed procedure was "designed for the security" of the taxpayer it was mandatory, and the taxpayer had no duty to pay a tax assessed without compliance with that procedure whether or not he could or did discern the official purpose to tax him.[118]

The conclusion seems justified that the New York courts have given landowners a rather high degree of protection in the application of legislation prescribing notificatory procedures in the assessment and collection of taxes. Some attention should be given to one feature of the nineteenth-century tax system of New York that may have had some influence upon the courts' original attitude in this matter, although their opinions nowhere referred to it explicitly as having influenced their decisions: Until 1903, the general tax law of New York provided no device for communication of personal notice to nonresident landowners[119] to apprise them that their land had been taxed.[120] Before that date, there was no provision in the tax law even authorizing the sending of tax bills to such nonresident owners. With respect to residents, the Revised Statutes of 1829 required the collector to call at least once upon the taxpayer, or at his usual residence, and demand payment of the taxes charged to him on his property,[121] thereby establishing a requirement that was not relaxed until 1934, when the provision was changed to make the personal call by the collector permissive rather than mandatory in form.[122] In 1936, the provision authorizing such a personal call was supplemented by the modern statute requiring the collector to mail tax bills to each owner of land included in the tax roll whose name and address he is able to ascertain, apparently regardless of the owner's residence.[123] Thus, except for the period from 1934 to 1936, tax collectors have been under a duty since 1829 to give some prescribed form of personal notice to residents of the taxing of their land within the tax district; whereas nonresidents were not entitled to any form of personal notice until 1903, when nonresidents of towns were first given the privilege of demanding a mailed statement of their town taxes—a privilege eventually extended to nonresidents of other tax districts. As a practical matter, the divers postings and newspaper publications required at successive stages of the assessment and collection process formed the only means that the system provided by which a nonresident owner might be afforded—even if casually

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[116] See, *e.g.*, Blum v. Nassau Purchasing & Bldg. Corp., 256 N.Y. 232, 176 N.E. 176 (1931); McCoun v. Pierpont, 232 N.Y. 66, 133 N.E. 355 (1921); People v. Patenaude, 286 App. Div. 140, 142 N.Y.S.2d 305 (1955); Ramot Realty Corp. v. Manetto Holding Corp., 258 App. Div. 223, 16 N.Y.S.2d 41 (1939); First Trust & Deposit Co. v. Luther, 225 App. Div. 722, 231 N.Y. Supp. 361 (1928).

[117] Slud v. Guild Properties, Inc., 6 Misc. 2d 188, 194, 119 N.Y.S.2d 347, 355 (1952), *aff'd*, 280 App. Div. 1018, 116 N.Y.S.2d 748, *reargument denied*, 281 App. Div. 776, 117 N.Y.S.2d 920 (1953).

[118] Cruger v. Dougherty, 43 N.Y. 107 (1870); Dike v. Lewis, 2 Barb. 344 (N.Y. Sup. Ct. 1848); *cf.* Merritt v. Village of Portchester, 71 N.Y. 309, 27 Am. Rep. 47 (1877). *But see* Jewell v. Van Steenburgh, 58 N.Y. 85, 92–93 (1874), in which it is said that lack of required notice may be cured by appearance of the landowner before the board of review to protest the assessment.

[119] The term "nonresident owners" refers, of course, to owners of land that is located in a given tax district (city, town, village or school district, as the case may be) who are not residents of that district. Such owners were thought of as not being personally within the jurisdiction of the assessors of that district even though they might reside within the same county. See note 4 *supra*.

[120] See N.Y. Sess. Laws 1903, ch. 338, adding a new section (§ 70-a) to the tax law of 1896 (N.Y. Sess. Laws 1896, ch. 908). The act of 1903 provided that a nonresident owning real property in a town might file with the town clerk a notice stating his name, residence and address and a description of his property. Under the original language of the statute, the clerk was to supply the town tax collectors with a transcript of such notice, and the collectors were then to mail to such nonresident a statement of taxes due on his property.

This statute, frequently amended in detail, has been carried forward into section 982 of the Real Property Tax Law.

A parallel provision for nonresidents of cities was originally enacted in 1915, N.Y. Sess. Laws 1915, ch. 485, and has been carried forward, as amended, into section 984 of the Real Property Tax Law. A parallel provision for nonresidents of villages was not enacted until 1927. N.Y. Sess. Laws 1927, ch. 650, § 12-a. That provision now appears in amended form in section 1404 of the Real Property Tax Law.

The earliest provision for mailing of notice of taxes to nonresidents seems to have been contained in N.Y. Sess. Laws 1890, ch. 526, which provided that where the amount of a school tax was one dollar or more, the collector was to mail or deliver personally a notice that taxes were due, to all nonresident taxpayers listed in his warrant whose residence or post office address might be known to the collector or which might be ascertained by him upon certain inquiries. That provision, which was included for many years in the Education Law, now appears in amended form in section 1322(2) of the Real Property Tax Law.

In addition to filing a notice with the city or town clerk under the acts of 1903 and 1915, a nonresident was permitted after 1916 to mail a demand for a tax statement to the collector himself, whereupon the collector was required to mail a statement to the nonresident within twenty-four hours of the demand. N.Y. Sess. Laws 1916, ch. 323, § 39. After 1936, the necessity for demand was eliminated and the collector was required to mail a statement to each owner of real property listed on the roll. N.Y. Sess. Laws 1936, ch. 443.

[121] 1 N.Y. Rev. Stat. 1829, ch. 13, tit. 3, art. 1, § 1. The notice by personal call of the collector was supplemented in 1845 by a requirement of posting, N.Y. Sess. Laws 1845, ch. 180, § 29, and in 1896 by a further requirement, in the case of city taxes, of newspaper publication for two weeks. N.Y. Sess. Laws 1896, ch. 908, § 70. Posting and publication provisions applicable to both cities and towns are contained today in section 920 of the Real Property Tax Law. The collecting officer may still call on a resident taxpayer and demand payment of unpaid taxes after January 31. N.Y. Real Property Tax Law § 926..

[122] N.Y. Sess. Laws 1934, ch. 610, § 1.

[123] N.Y. Sess. Laws 1936, ch. 443. The language of that statute now appears in N.Y. Real Property Tax Law § 922. It is explicitly provided in that section that failure to mail such statement shall not affect the validity of the taxes or interest prescribed by law with respect thereto.

—some warning of his liabilities. Except as he might be reminded by such publication or posting, the nonresident had no notice, other than that derived from the provisions of the tax statutes themselves, of action by tax officials affecting his interests in districts other than his own. While the constitutionality of the arrangement was hardly open to doubt after the decision of the Supreme Court in *Hagar v. Reclamation Dist. No. 108,*[124] the possibility remained that a nonresident owner might neglect to pay the tax upon his land by oversight without ever receiving anything resembling personal notice to remind him of his duties in the matter. That possibility may have had some weight with the courts of the nineteenth century as they met the recurring problem of determining the legal consequences to be attached to official errors in carrying out procedures designed to afford notice.

The consequences of nullifying official action in property assessment and taxation were serious and pervasive, extending far beyond the individual controversies adjudicated. The cumulative effect of frequent nullifications over the years was to undermine the reliability of tax deeds executed at the end of the collection process—to say nothing of the direct, drastic effect upon local fiscal arrangements of occasional decisions that invalidated, in effect, assessment procedures used throughout an entire municipality. Yet the need for legality of official action in this area was genuine enough, both to protect the individual property owner against unfair surprise or overreaching and to foster community acceptance of the entire system. The history of the personal property tax serves as a warning that serious inequities in the structure and administration of a tax system can lead to its collapse through widespread evasion.[125] The basic difficulty that the courts faced in articulating the need for official regularity with the need for efficient sanctions lay in the rigidity of the jurisdictional concept. The idea that official errors were either "jurisdictional" or "nonjurisdictional" led inevitably to all-or-nothing results in the cases. It became apparent that there was need of some device that would cut off stale claims by landowners of official error in the administration of the system. That need the legislature endeavored to meet after 1885 by curative statutes and special statutes of limitation. The effect of that legislation will form the subject of Part IV of this article.

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[124] 111 U.S. 701 (1884). See note 12 *supra.*

[125] See REPORT OF N.Y. STATE COMMISSION FOR REVISION OF THE TAX LAWS, LEG. DOC. No. 77 (1932) 123–24.

COMMENTS

A CONSIDERATION OF LOBBYING CONTRACTS AND THE FEDERAL GOVERNMENT'S ATTEMPT TO REGULATE SUCH CONTRACTS

Lobbying, as generally understood in the United States, means to address or solicit members of a legislative body for the purpose of influencing their vote.[1] Lobbying contracts have been a problem to the courts ever since legislatures have been in existence. The problem arises due to the strong tendency of such contracts to induce the use of illegal means to sway the votes of the members of a legislature. *Marshall v. Baltimore & O. R. R.*,[2] one of the earliest cases in this country to discuss fully the subject of lobbying contracts and their legality, laid down the principle that the courts should pronounce void every lobbying contract "the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided."[3] However, the Court recognized the right of persons who might be affected by the private or public acts of the legislature to present their views either in person or through their counsel before legislative committees. It was pointed out that the difficulty lies in applying this principle and deciding whether a particular lobbying contract is against public policy.

The statement made in the *Marshall* case concerning the legality of lobbying contracts was reiterated in *Steele v. Drummond*.[4] In the *Steele* case the defendant entered into a contract to provide railway service to an area in which the plaintiff owned substantial amounts of land. The plaintiff promised to obtain the necessary ordinance and franchise from the town through which the railroad was to run. Upon suit for breach of contract for refusing to render continuous service, the defendant contended that the contract was illegal and void because the plaintiff's promise to procure the passage of the ordinance was contrary to public policy. The Court, while recognizing the principle that contracts requiring the obtaining of legislative action by means of personal influence, solicitation or by corrupt means are void, distinguished the *Steele* case on the ground that the plaintiff was not employed to secure the passage of the ordinance but did so to enhance the value of his property. Although the plaintiff owned property that might have increased in value because of the construction of the railroad, the Court held that "neither the contract, nor what was done, suggests that the location or construction of the proposed line was not a legitimate enterprise undertaken for the public good, or that anything improper was contemplated as a means to secure the passage of the ordinance."[5] The Court in passing on this problem emphasized that freedom of contract should not be lightly interfered with and that only in clear cases of detriment to the public interest should such contracts be held void and unenforceable.

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[1] See, *e.g.*, United States v. Rumely, 345 U.S. 41, 47 (1953); Colusa County v. Welch, 122 Cal. 428, 55 Pac. 243, 244 (1898).

[2] 57 U.S. (16 How.) 314 (1853).

[3] *Id.* at 334.

[4] 275 U.S. 199 (1927).

[5] *Id.* at 206.

Even though lobbying may have unpleasant connotations to the average citizen,[6] petitioning the government is a guaranteed constitutional right and if properly conducted can be an important part of the law-making process.[7] The courts, in attempting to preserve the right of petition and at the same time protect the public interest in keeping the legislature from making improperly influenced decisions, have drawn a distinction between the use of solicitation or personal influence and legitimate service rendered to help the legislature make a reasoned decision on the matters before it. For example, in the case of *Kansas Pac. Ry. v. McCoy,*[8] Justice Brewer, speaking for the supreme court of Kansas, emphasized the point that the use of money to influence the legislature was not always wrong. The court upheld the particular contract in issue, which provided for the publication of circulars and pamphlets that were distributed openly and publicly among the members of the legislature. The court said that such a contract must be distinguished from one that provides for the use of direct or indirect personal influence upon individual legislators in an attempt to secure their votes as public officials. The latter type of contract, the court said, should be condemned.

The conclusions arrived at in the *Kansas Pac. Ry.* case were further developed in *Adams v. East Boston Co.,*[9] in which the defendant entered into a contract whereby it agreed to compensate the plaintiffs as its agents for effectuating the sale of some lands. Since the land was suitable only for port development, it was necessary that it be sold to the commonwealth of Massachusetts if the parties expected to dispose of it. In order to accomplish the sale, the plaintiffs conducted a systematic campaign, the purpose of which was to reach individual legislators for support of a proposed bill that would enable the commonwealth to buy the land. The plaintiffs also sought to influence the legislators to vote for a speaker of the House of Representatives who would be favorable to the bill and who would have the power to appoint a House committee whose members would be in favor of public acquisition of the land. The court, in passing upon the validity of the contract, pointed out that the contract on its face showed no tendency to injure the public. It also recognized the principle that the parties to a contract have the right to urge the legislature and its committees to pass a proposed act. However, the court, in affirming a judgment for the defendant, stated:

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[6] See Ga. Const. art. I, § 2–205, in which lobbying is declared to be a crime. *This Is How Payola Works in Politics,* 77 READER'S DIGEST 46 (Aug. 1960), gives Assemblyman X's account of the dilemma of a state assemblyman who desires to be effective, independent and honest and the result that lobbies have upon this desire.

[7] U.S. Const. amend. I., which guarantees the rights of petition, speech and press. Although the right to petition is not the same as the right to free speech, it is an integral part of it. Thomas v. Collins, 323 U.S. 516 (1945). The right to petition is not absolute, however, but must be exercised in the public interest. American Communications Ass'n v. Douds, 339 U.S. 382 (1950). Under our system of government, lobbies have a legitimate and indispensable role to play. ZELLER, *State Regulation of Lobbying,* THE BOOK OF THE STATES 124 (1948–49). Nearly all states have constitutional provisions guaranteeing the right of petition. See COLUMBIA UNIVERSITY, LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS 34 (2d ed. 1959).

[8] 8 Kan. 538 (1871).

[9] 236 Mass. 121, 127 N.E. 628 (1920).

> It is not necessary that the parties should stipulate for corrupt action to be procured or induced by bribery, or the promise of future monetary gain. . . . It is sufficient if the contract when applied to the facts inevitably tends to results which impair not merely the character of the Legislature, but the public confidence in its integrity. The question whether the flats should be acquired for the public benefit rested solely in the determination of the Legislature whose members were bound to exercise their judgment uninfluenced by extraneous considerations whether arising from motives of friendship, or the desire to benefit, or subserve directly or indirectly private interests under whatever guise they might assume. And the distinction . . . is obvious between solicitation or influence exerted to secure legislation, and legitimate services to enable legislators to understand the merits of measures upon which they are called to pass.[10]

The court concluded that the payment of a commission was conditioned upon the plaintiffs' success in selling the land by legitimate means. However, in this case the consideration the plaintiffs were to receive was based upon what they had unlawfully done.

Other courts have taken the position that the mere fact that the agreement is a lobbying contract makes it void and unenforceable per se.[11] In *Hayward v. Nordberg Mfg. Co.*,[12] where the plaintiff was to aid in the procurement of a contract for the sale of a pumping engine to the city of Grand Rapids by contacting the members of the city council, the court in denying him compensation concluded:

> When it is sought to secure, through the court, compensation for procuring legislation, or securing public contracts . . . the court will repel . . . and lend no assistance to the enforcement of such engagements. *All* indirect methods of influencing public officials in respect to public business intrusted to them are immoral, and tend to contaminate and corrupt the integrity of our social and political institutions.[13]

Cases taking this position have held that the intention of the parties does not matter; nor does it matter that no improper or unlawful means were used or intended to be used.

A sounder view is presented in *Knut v. Nutt* [14] and *Luff v. Luff*,[15] where the principle was recognized that if there is no improper solicitation of the members of Congress, the party performing the services will not be denied compensation if it is reasonable.[16] An attorney was employed, in the *Knut* case, to prosecute a claim against the Government. In the contract it was stated that he should prosecute this claim in the courts "or through any diplomatic negotiations as may be deemed by him best for the interests" [17] of the claimant. In holding the contract valid, the court stated that the mere fact that the words in the contract were capable of an improper construction was not enough to vitiate the contract in the absence of actual proof that such improper solicitation was contemplated or used. In the *Luff* case, a partnership had a claim for $375,577.37 against the United States. The defendant, one of the partners, through solicitation, procured the passage of private legislation in reference to the payment of this claim. The question was raised as to whether payment for such services would be illegal. The court, in upholding the defendant's claim for compensation, held that he was entitled to reasonable compensation for his services since the record did not suggest that any improper means were utilized in obtaining the legislation. This view has sometimes been regarded as supported by a presumption of legality; *i.e.*, that detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated.[18]

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[10] *Id.* at 128, 127 N.E. at 631.

[11] Hayward v. Nordberg Mfg. Co., 85 Fed. 4 (6th Cir. 1898); Mills v. Mills, 40 N.Y. 543 (1869).

[12] 85 Fed. 4 (6th Cir. 1898).

[13] *Id.* at 11 (Emphasis added.)

[14] 83 Miss. 365, 35 So. 686 (1903), *aff'd*, 200 U.S. 12 (1906).

[15] 267 F.2d 643 (D.C. Cir. 1959).

[16] *Ibid.*

In view of the purpose of the constitutional right to petition the government,[19] which may be exercised by lobbying,[20] and the policy against undue interference with freedom of contract,[21] it is submitted that the rule elaborated in the *Luff* case represents the better view. This view is best summarized by saying that a person who acknowledges his interest and does not resort to any underhanded or objectionable methods to achieve his ends may contract to appear before the legislature to present, openly and fairly, the merits of his claim or to urge the passage or defeat of a bill.[22]

Lobbying contracts on a contingent basis, as illustrated by *Hazelton v. Sheckells*,[23] have been held to be void per se, since such contracts furnish the strongest incentive for the use of objectionable practices such as bribery.[24] In the *Hazelton* case, plaintiff maintained a suit against defendant for specific performance of a contract to sell land that Congress had voted to acquire. The agreement provided that a part of the consideration was to consist of services to be rendered by the plaintiff in bringing the property to the attention of Congress as a site for the construction of a building. Pursuant to the contract, the plaintiff collected and printed facts for the information of the committees and members of Congress, and drafted a bill for the purchase of the land. Even though this contract did not appear to contemplate the use of any objectionable practices, the Court held it void on the ground that compensation would not be paid unless the desired results were obtained.

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[17] 83 Miss. 365, 370, 35 So. 686, 687 (1903).

[18] Steele v. Drummond, 275 U.S. 199, 205 (1927); see also Valdes v. Larrinaga, 233 U.S. 705, 709 (1914).

[19] See note 7 *supra.*

[20] Library of Congress, Legislative Reference Service, *The Constitution of the United States of America,* S. Doc. No. 170, 82d Cong., 2d Sess. 810 (1953). It is there stated that lobbying is regarded as the most frequent expression of the right to petition.

[21] Baltimore & O.S.W. Ry. v. Voight, 176 U.S. 498, 505 (1900).

[22] Luff v. Luff, 267 F.2d 643 (D.C. Cir. 1959); Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 253 Pac. 726 (1927); Adams v. East Boston Co., 236 Mass. 121, 127 N.E. 628 (1920).

[23] 202 U.S. 71 (1906).

[24] Hazelton v. Sheckells, 202 U.S. 71 (1906); Trist v. Child, 88 U.S. (21 Wall.) 441 (1874); McNeill v. Nevius, 187 F.2d 81 (D.C. Cir. 1950), which held that contingent fee arrangements, conditioned on the obtaining of favorable legislation are unenforceable in the courts.

There appears to have been a slight tendency to depart from this strict rule and to hold that if the parties did not intend the use of objectionable practices at the time of the making of the contract and in fact did not use such practices, the contract is not void per se.[25] However, the majority of the courts, including New York,[26] have taken the position of the *Hazelton* case in holding that lobbying contracts based on contingent fees will be unenforceable as against public policy.[27] The rule followed by the majority of the courts is consonant with sound reasoning since persons should have the right to "lobby," if done openly and fairly. Contracts of the contingent fee type should not be upheld, however, because of their strong tendency to promote objectionable practices.

The state of the law today is that one has the right to lobby, and considerations as to the validity of such contracts, with the exception of contingent fee arrangements, depends on the methods used or contemplated. This is further borne out by the passage of the Federal Lobbying Act of 1946,[28] which is an attempt by the federal government to regulate lobbying. Many states have also passed statutes similar to the federal Act.[29] The purpose of the Federal Lobbying Act is to publicize lobbying activities, since without such an act the public becomes aware of the problem only when the breach of such a contract results in litigation. In the usual case, a lobbying contract would be carried out without being brought to public attention. The Act attempts through requiring registration of lobbyists and contributions to correct this situation. The Act was an attempt to adapt "present imperfect mechanisms for expressing group opinion into a political pattern which will utilize this opinion to improve the decision-making process." [30] The necessity for such an act is illustrated by the fact that in 1951 alone, some 295 lobbyists filed reports, and registered lobbying groups spent some $9,500,000.[31] The federal Act states in section 266 that the provisions of the Act shall apply to any person who solicits, collects, or receives money to be used in influencing federal legislation. Section 262 requires that persons who receive or solicit contributions for lobbying purposes must retain detailed accounts of receipts and expenditures for two years. By sections 263 and 264 anyone who receives or expends any money for such purpose must file with the clerk of the House of Representatives detailed statements listing the names of those individuals who made contributions of $500 or more. Those who receive $500 or more are required to render an accounting. Those who hold themselves out as lobbyists must register under section 267, with the clerk of the House and the secretary of the Senate, listing their employers, rate of pay, and how much they are to be paid for expenses. They must also file detailed financial reports, indicate the legislation favored or opposed, and list the papers or publications in which they caused articles to be published. Section 265 requires that such statements be filed with the clerk and be preserved for two years from the date of filing. The penalty provision, section 269, makes violation of the provisions a misdemeanor and provides for debarring such persons for three years from further lobbying activities.

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[25] Stansell v. Roach, 147 Tenn. 183, 246 S.W. 520 (1923).

[26] Mills v. Mills, 40 N.Y. 543 (1869).

[27] See, *e.g.*, McNeill v. Nevius, 187 F.2d 81 (D.C. Cir. 1950); Mills v. Mills, *supra* note 26.

[28] 60 Stat. 839–42 (1946), 2 U.S.C. § 261–70 (1958).

[29] Typical of the state statutes is section 66 of the N.Y. Legislative Law, which provides that every person retained or employed for compensation as a counsel or agent by any firm, person, corporation or association to promote or oppose directly or indirectly the passage of bills or resolutions must each year before performing any services file with the Secretary of the State. He must state the names of the persons for whom or in whose behalf he is working and also describe the legislation that he is interested in. The statute specifically makes any lobbying contracts of a contingent arrangement punishable by fine or imprisonment. A verified itemized statement showing all expenses must be filed by every lobbyist within two months after the adjournment of the session. Duly accredited counsels and agents of municipal governments and public institutions are excused from the provisions of the act. Fines of up to $1000 and one year in jail are provided for. A further penalty attaches to corporations which violate its provisions in that they are subject to a $200 a day fine for each day late in filing after the adjournment of the session. The Attorney General of New York has expressed the opinion that this section was intended only to cover the professional lobbyist who has no personal interest in the legislation he attempts to influence. 1939 ATT'Y GEN. ANN. REP. 233. Massachusetts in 1890 was the first state to adopt such measures and by 1947, some twenty-two states had already enacted similar provisions. Among the state statutes regulating lobbying are: Ga. Code Ann. § 47–1002 (1937); Kan. Gen. Stat. Ann. § 46–203 (1935); Ky. Rev. Stat. §§ 6.260, 6.280 (1944); Mass. Ann. Laws, ch. 3 § 40, 41; Me. Rev. Stat. ch. 9, §§ 40, 41 (1944); N.C. Gen. Stat. Ann. §§ 120–40 (1943); Ohio Code Ann. § 6256–1 (1940).

This particular Act has met with much criticism from scholars [32] and has been the subject of several suits concerning the constitutionality of its various provisions.[33] In *United States v. Slaughter*,[34] it was held that section 267, which requires registration with the secretary of the Senate and the clerk of the House, does not abridge the right of free speech and petition, since registration requires only that persons subject to this provision disclose for whom they are speaking. The court recognized that Congress had a right to demand such information. The Act's next test came in *National Ass'n of Mfrs. v. McGrath*.[35] In that case the district court held that sections 262–266 were unconstitutional as being too vague and indefinite and therefore violative of the due process clause of the fifth amendment. Section 269 was also held unconstitutional as being violative of the right of freedom of speech and of the right to petition the government. On appeal, the Supreme Court set aside the judgment on the ground that the case had become moot during the progress of the litigation.[36]

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[30] Comment, *Improving the Legislative Process; Federal Regulation of Lobbying*, 56 YALE L.J. 304, 332 (1947).

[31] 97 Cong. Rec. 9575 (1951).

[32] Zeller, *The Federal Regulation of Lobbying Act*, 42 AM. POL. SCI. REV. 239 (1948).

[33] United States v. Rumely, 345 U.S. 41 (1953); United States v. Harriss, 109 F. Supp. 641 (D.D.C. 1953), *rev'd*, 347 U.S. 612 (1954); National Ass'n of Mfgs. v. McGrath, 103 F. Supp. 510 (D.D.C.), *vacated as moot*, 344 U.S. 804, *rehearing denied*, 344 U.S. 887 (1952); United States v. Slaughter, 89 F. Supp. 205 (D.D.C. 1950).

[34] 89 F. Supp. 205 (D.D.C. 1950).

[35] 103 F. Supp. 510 (D.D.C.), *vacated as moot*, 344 U.S. 804, *rehearing denied*, 344 U.S. 887 (1952).

In 1953, in *United States v. Harriss,*[37] the district court followed the decision of the *McGrath* case and decided that section 267 violated the due process clause because of its vague and indefinite language. The court also stated that the penalty provision, section 269, was not severable and that since part of the penalty provision, section 269(b), was bad, the whole section was unconstitutional. The court also held that the penalty provision attached not only to violations of section 264 but also to violations of section 267. This decision was in direct contrast to the *Slaughter* case, leaving conflicting decisions in the district courts. On direct appeal to the Supreme Court under the Criminal Appeals Act,[38] the Court held that sections 264, 266 and 267 were not too vague and indefinite to meet the requirements of due process,[39] and that they did not violate the freedoms guaranteed by the first amendment of the United States Constitution.[40] The Court did not pass on the constitutionality of section 269(b), dealing with barring of lobbyists, as it had not yet been applied to the individuals involved but expressed the opinion, in passing, that if 269(b) were found to be invalid it was separable.[41]

The Supreme Court, in the *Harriss* case, gave the Act a restricted interpretation so as to make its provisions apply only with respect to expenditures made for the principal purpose of direct communications with Congress.[42] In effect, the Court held that the Act did not apply to expenditures made for so-called indirect lobbying, *i.e.,* expenses for activities designed to influence public opinion on matters of legislative policy.[43] Another defect pointed out by the *Harriss* case is that the language of section 266 seems to exempt large organizations such as chambers of commerce since their legislative activities are merely incidental to their principal purposes. Therefore, conceivably any large organization that expends large sums on lobbying but does not ear-mark such money can avoid the effect of the statute.

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[36] McGrath v. National Ass'n of Mfrs., 344 U.S. 804, *rehearing denied,* 344 U.S. 887 (1952).

[37] 109 F. Supp. 641 (D.D.C. 1953), *rev'd,* 347 U.S. 612 (1954).

[38] 18 U.S.C. § 3731 (1958). United States v. Harriss, 109 F. Supp. 641 (D.D.C. 1953), *rev'd,* 347 U.S. 612 (1954).

[39] United States v. Harriss, 347 U.S. 612 (1954).

[40] *Id* .at 626–27.

[41] 347 U.S. 612, 627 (1954).

[42] United States v. Harriss, 109 F. Supp. 641 (D.D.C. 1953), *rev'd,* 347 U.S. 612 (1954); see also Sunderland, *Taxation of Free Speech,* 26 Chi. L. Rev. 109, 120 (1958).

[43] The narrow interpretation rendered by the *Harriss* case indicates that a broader coverage of the Act would be desirable. This is evidenced by the factual situation presented in Noerr Motor Freight v. Eastern Railroad Presidents Conference, 155 F. Supp. 768 (E.D. Pa. 1957). In that case, an action was commenced by a trucking association and member firms against a railroad association, their members, and a public relations firm hired by them. The complaint charged a conspiracy to drive the truckers out of the long-haul freight business and to obtain a monopoly for the railroads. The defendants, through speeches, advertisements, and campaigns, had attempted to show that the trucking industry was not paying its fair share of the tax burdens, that big trucks were responsible for highway deterioration, and that through these means defendants had attempted to promote legislation harmful to the truckers. As a result of such activity, the defendants had been instrumental in obtaining the passage of legislation in New Jersey that resulted in the reduction of the permissible maximum axle load. Similar activities were carried out in Ohio and New York.

The broad accounting requirements under the Act open the door to "concealment by over-disclosure." [44] Under the Act three types of accounts are necessary. Section 267 requires detailed quarterly reports of *all* money received or expended. Under section 262, detailed accounts must be kept for two years. Section 264 requires any person who receives or expends money for lobbying to file an accounting with the clerk of the House. Thus, section 267 requires accounts of all receipts and expenditures while section 264 permits aggregate listing of contributions under $500. Through these broad requirements there will result such a mass of material that it may be doubted whether persons interested in such activities will be willing to sift through reports of entire accounts to find particular items that deal with lobbying. Not only does the individual have difficulty in finding particular lobbying reports but one of the goals of the Act, that of publicizing lobbying activities and expenses, is defeated. Vast volumes of material consisting mostly of statistical data makes it almost impossible to draw any meaningful conclusions from the reports printed in the Congressional Record.[45] One other defect of the Act is that it places on the individual the full responsibility for determining whether it applies to him since there is no agency to whom one can refer to discover whether he must register under the Act. Therefore many persons who are in doubt, register, thereby adding more reports, which serve to bury particular figures even deeper.

Since the present Act has not adequately dealt with the regulation of lobbying, and in fact does not carry out one of its main purposes, that of providing publicity for lobbying activities, it is manifest that something should be done to rectify the situation. The most obvious answer is to correct the provisions of the existing Act.

In 1957, a bill entitled the "Legislative Activities Disclosure Act" [46] was proposed to amend the Federal Regulation of Lobbying Act.[47] Its aims are similar to those of the existing Act in that the purpose is to regulate harmful lobbying practices by requiring disclosure of contributions and expenditures for lobbying purposes. The proposed law eliminates section 269(b) and substitutes proposed section 316, which provides for punishment for the failure to file, by a fine of not more than $10,000 or imprisonment for not more than twelve months, or both. The definition in section 302 of the coverage of the proposed law would extend it to include not only direct communications with members of Congress, any committee, sub-committee, officer or employee thereof. The proposed law also includes communications with agencies and departments of the federal government that are not covered under the present Act.[48] Under the proposed law it would be possible to procure an administrative determination as to whether an individual is considered a "legislative agent." Such a determination cannot be had under the present Act.[49] Proposed section 306 does away with the "principal purpose" clause[50] of the present Act and attempts thereby to avoid the objections of vagueness and ambiguity that attach to present section 266. An attempt is also made to include indirect lobbying in proposed section 306.[51] This section would specifically cover the type of situation mentioned in the *Noerr Motor*[52] case; namely, that of disclosing mass-media campaigns designed to incite the public to communicate directly with the legislators although such campaigns do not specifically request such communication. Section 306 is also directed at the type of pressure group propaganda that is characterized by misrepresentation or distortion of fact and made effective by concealment of the source.

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[44] Note: *The Federal Lobbying Act: A Reconsideration,* 21 GEO. WASH. L. REV. 585, 597 (1953).

[45] *Ibid.*

[46] S. 2191, 85th Cong., 1st Sess. (1957), referred to the Senate Committee on Government Operations. A companion bill was introduced in the House as H.R. 8346 and referred to the Committee on the Judiciary.

[47] 60 Stat. 841–42 (1946), 2 U.S.C. §§ 267–70 (1958).

The exemption provisions of the proposed law[53] are similar to the sections in the present Act except for one important distinction. One who merely appears before a committee of the Congress of the United States in support of or in opposition to legislation is exempted where he receives no compensation other than expenses.

It may be concluded that the present Federal Lobbying Act is inadequate because of its limited coverage and latent ambiguities. The proposed amendment would seem to be an improvement over the existing law.[54] It is evident that as a result of the widening scope of proposed legislation that must be considered by Congress, an even greater need exists today for legislation regulating lobbying and lobbying contracts. A thorough study of this situation by Congress in order that it may replace the existing Act with a more workable statute seems to be both necessary and desirable at the present time.

JAMES A. MURPHY, JR.

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[48] S. 2191, 85th Cong., 1st Sess. § 302(f) (1957).

[49] S. 2191, 85th Cong., 1st Sess. § 302(g) (1957).

[50] 60 Stat. 841 (1946), 2 U.S.C. § 266 (1958).

[51] S. 2191, 85th Cong., 1st Sess. § 306 (1957).

[52] See note 43 *supra*.

[53] S. 2191, 85th Cong., 1st Sess. § 314 (1957).

[54] Memorandum from House Committee on Government Operations to Congressman Carleton J. King, Feb. 1, 1961, stating that no action has yet been taken by the Senate Committee on Government Operations on S. 2191.

EXTENSION IN NEW YORK OF THE RULE IN GRIFFIN V. ILLINOIS

Habeas corpus and coram nobis proceedings, widely used to test the validity of criminal convictions after the time for direct appeal has expired, are remedies firmly established in the traditions of Anglo-American law.[1] Since the right of a defendant to be represented by counsel is considered fundamental,[2] an issue arises in these proceedings with respect to the extent counsel must be supplied to satisfy the basic requirements of due process. Unfortunately, the law in this area is less than clear. It is this problem and the impact of recent case law, on this problem that will be the considerations of this paper.

THE FORMATION OF THE FEDERAL RULE: THE REQUIREMENT OF COUNSEL

In *Powell v. Alabama,*[3] a landmark decision concerning the relation of representation by counsel to due process, the Supreme Court held that an indigent defendant must be assigned counsel in a capital case. Although this is the narrow holding of the case, it has been often cited to sustain a position somewhat broader than the facts of the case warrant.[4] Approximately a decade following the *Powell* decision, the Supreme Court again in considering the right to counsel, posed this question: "Is the furnishing of counsel in all cases whatever dictated by natural, inherent, and fundamental principles of fairness"?[5] Although the manner in which the *Powell* case has been cited would lead one to expect an affirmative answer, the Supreme Court answered in the negative. By its decision in *Betts v. Brady,*[6] the Court indicated that there were limitations on the right of counsel. The position taken by the majority[7] was that it would be impossible to lay down any broad rule that would be susceptible to universal application. Justice Roberts in rendering the majority opinion advocated that the right to counsel for indigents should be decided on the particular facts of each case, and specifically rejected the proposition that a state must supply counsel in all cases.[8]

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[1] See Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus,* 61 HARV. L. REV. 657 (1947); see generally Longsdorf, *Habeas Corpus A Protean Writ and Remedy,* 8 F.R.D. 179 (1948); Fraenkel, *Federal Habeas Corpus Jurisdiction to Review State Convictions,* 14 F.R.D. 99 (1953).

[2] For an analytical review of the leading cases on this point see Rackow, *The Right to Counsel—Time for Recognition Under the Due Process Clause,* 10 W. RES. L. REV. 216 (1959).

[3] 287 U.S. 45 (1932).

[4] See, *e.g.,* Gibbs v. Burke, 337 U.S. 773 (1949); Bute v. Illinois, 333 U.S. 640 (1948); Betts v. Brady, 316 U.S. 455 (1942).

[5] Betts v. Brady, 316 U.S. 455, 464 (1942).

[6] 316 U.S. 455 (1942).

[7] *Id.* at 456–73.

[8] The Court stated: "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other consideration, fall short of such denial." *Id.* at 462.

In 1948, the Supreme Court handed down its decision in the case of *Bute v. Illinois,*[9] in which it re-stated the position it had taken in the *Betts* case. From the *Bute* case developed what became known as the "fair-trial" doctrine,[10] which provides that if a fair trial will be had, despite the presence or absence of some or any of the traditional safeguards of the right to trial, then due process has been observed. This position recognizes that the right to counsel cannot be considered in the abstract, but, to the contrary, must be considered in relation to the particular facts of the case presently in controversy.[11] The above cases dealt with representation by counsel in trials. In due course *Griffin v. Illinois* [12] suggested that similar problems might exist on appeal.

The *Griffin* case, decided eight years after the *Bute* decision, is the leading case cited to advocate the assignment of counsel in all criminal appellate procedures.[13] This case restates the fundamental nature of the right to counsel and maintains that indigent criminals must be granted the same remedies that a person of means might enjoy.[14] In the *Griffin* case, the Supreme Court was asked to pass upon the validity of an Illinois statute [15] which provided that a copy of the minutes of the trial would be supplied to indigent defendants at public cost only when the appellant was seeking review of a conviction for a capital offense. The Court, in striking the statute down as being a deprivation of due process held that the distinction between capital and non-capital crimes, for the purposes of appeal, was an unsupportable one. The actual holding in *Griffin* is quite narrow; that a transcript of the trial must be provided to all indigent defendants so that they may prosecute their appeals. The dictum, for which this case is probably better known, implies that any restrictions on the right of an indigent to appeal a conviction infringe on the guarantees of due process. Perhaps the explanation of such broad dictum can be found in the issue which the Court posed for itself: "[W]hether Illinois may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, administer this statute [the provision in Illinois for an appeal from a conviction] so as to deny adequate appellate review to the póor while granting such review in all others." [16] The approach to the problem which this issue indicates is somewhat beyond the specific question presented by the Illinois statute. It was not necessary to the decision in the *Griffin* case, that the Court consider such matters as the absolute right of an appealing defendant to have counsel. While *Griffin* is consistent with the holding that representation by counsel and such other safeguards are of basic importance to a fulfilment of the concept of due process, it is inconsistent with previous Supreme Court decisions [17] which recognized the fact that some cases are patently meritless and a refusal to assign counsel in the latter cases does not involve a denial of due process.

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[9] 333 U.S. 640 (1948).

[10] The "fair trial" doctrine is discussed at some length in the dissent by Justice Douglas. 333 U.S. 640, 678 (Douglas, J., dissenting).

[11] The *Betts* case also spoke of the "fair trial" doctrine and though it suffered temporary setbacks in its development, it was recognized in the case of *Carter v. Illinois,* 329 U.S. 173 (1946). See BEANEY, RIGHT TO COUNSEL 166 (1955) where the author in discussing the *Carter* case stated: "The Court's opinion included a vigorous reaffirmation of the fair-trial rule, which had been in abeyance since the *Betts* case. Perhaps it was the impact of the ever-increasing *in pauperis* applications from state convicts which made the majority quick to grasp at answers of a technical nature."

[12] 351 U.S. 12 (1956).

[13] See, *e.g.,* People v. Borum, 8 N.Y.2d 177, 168 N.E.2d 527, 203 N.Y.S.2d 84 (1960) that held for an extension of the right to counsel to all cases, abandoning any qualification of merits in the appeal. The *Griffin* decision, however, should not be extended to the position advocated for it in the *Borum* case, inasmuch as the language of the *Griffin* case will not support such an extension. Mr. Justice Frankfurter in his concurring opinion made this explicit limitation: "When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." 351 U.S. 12, 24 (1956). Substantially the same view was set forth in the case of United States *ex rel.* Marcial v. Fay, 247 F.2d 662, 665 (2d Cir. 1957).

[14] The representation of indigents is long-established in the traditions of the Bar. See, *e.g., N.Y. Bar Ass'n Oath of Admission,* N.Y. JUDICIARY LAW, app. 778, 779 where it is stated: "From ancient times, lawyers have pledged themselves never [to] reject . . . the cause of the defenseless or oppressed . . . for lucre or malice."

[15] ILL. REV. STAT. ch. 38, § 769.1 (1955), which must be read with ILL. REV. STAT. ch. 110, § 259.70A (1953), now ILL. REV. STAT. ch. 110, § 101.65 (1955).

Where an appellate court is satisfied that the appeal being presented brings to its consideration a substantial question to be reviewed, a hearing should be granted. Where, however, the appellate tribunal is satisfied from the face of the proceedings that the appeal has no merit, must it, nevertheless, grant the petitioner the same type of hearing that it affords in the latter situation? The question is then presented whether counsel must be assigned in all habeas corpus and coram nobis proceedings regardless of the merits of the appeals? In answer to this question the appellate courts of New York adopted the so-called "substantial merit" test.[18] This test required the court to be satisfied that the proposed appeal had substantial merit, before an application for an assignment of counsel would be granted.[19] As applied to state appellate procedures, the substantial merit test is a reflection of the fair trial doctrine. Where an application does not show substantial merit it would not violate the fair trial doctrine to dismiss the appeal since no valid question is being presented by such an application. In cases in which no merit is found in the appeal the due process standard is not violated by denying an application for the assignment of counsel and thus the substantial merit test is wholly consistent with the fair trial doctrine of the federal courts.

The substantial merit requirement in New York was probably adopted from the practice in the federal courts.[20] The federal rules require a certificate of probable cause to be provided before the appellate court will review a habeas corpus proceeding.[21] If the court feels there is a worthy point being argued by petitioner, it will grant the certificate, which is no more than a recognition that the appeal has sufficient substance to justify a full hearing of the merits. The purpose of this rule in the federal judiciary is to prevent the courts from being deluged by specious applications and appeals.[22] Unless the petitioner shows some "color of substance" to his appeal, his application for counsel will be denied.[23] The federal courts have also refused to review a state conviction where there was no semblance of a substantial claim asserted on which to base an appeal.[24] Federal courts not only point out the efficacy of this test,[25] but also refuse to take jurisdiction of the appeal unless the requisite certificate of probable cause accompanies the application.[26] New York does not have a statutory provision with respect to this matter, but the courts apparently have denied applications on their own initiative where they have considered them groundless.[27]

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[16] 351 U.S. at 13.

[17] See Bute v. Illinois, 333 U.S. 640 (1948); Betts v. Brady, 316 U.S. 455 (1942).

[18] These "merits" refer to the basic legal rights of a defendant to counsel. It should be distinguished from mere questions of practice, such as the form of affidavits and petitions, which matters are within the court's discretion to regulate and adjust, according to the individual case. The federal courts view the necessity for these merits as essential to the jurisdiction of the appellate tribunal, and they hold that this requirement of merit is the product of strong public policy. See *Ex parte* Farrell, 189 F.2d 540, *cert. denied,* 342 U.S. 839 (1951).

[19] See *In re* Schulte, 21 F. Supp. 1016 (E.D. Ky. 1938). *But see* People v. Breslin, 4 N.Y.2d 73, 149 N.E.2d 85, 172 N.Y.S.2d 157 (1958); People v. Dolac, 3 App. Div. 2d 351, 160 N.Y.S.2d 911 (1957).

TRANSFORMATION OF NEW YORK'S POSITION ON THE RIGHT TO COUNSEL IN SPECIAL APPEALS

The courts of this state have long recognized the right to counsel on appeal.[28] Since the remedies of habeas corpus and coram nobis are effectively used to appeal criminal convictions, the question is presented whether counsel must also be granted "as of right" in these proceedings. The answer to this question is the result of a development of the court of appeal's thinking starting with the case of *People v. Kalan* [29] through the more recent decision in *People v. Borum*.[30]

The initial case in this development, the *Kalan* case, arose on a question of direct appeal from a conviction in the county court. The defendant, convicted of grand larceny in the second degree, could neither afford counsel nor pay for the transcript of his trial minutes, and being in prison, was personally unable to inspect the minutes. The court of appeals held that *under the circumstances* it would be a denial of due process if counsel were not assigned. The statement made in the *per curiam* opinion that "while we do not decide that failure to appoint counsel will always constitute a deprivation of constitutional rights, we nonetheless hold that, under the circumstances of this case, refusal to assign counsel upon defendant's request prevented an effective use of the right to appeal . . . ,"[31] caused future uncertainty as to whether the substantial merit test was placed in jeopardy by this holding. Later cases cite *Kalan* for the proposition that the substantial merit standard should be abandoned although the scope of the holding was not so broad.[32]

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[20] For the federal provisions pertaining to the substantial merit test see 28 U.S.C. §§ 2241–2253 (1958). Section 2253 provides: "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding . . . unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

[21] 28 U.S.C. § 2253 (1958).

[22] The general legislative history and purpose of this provision are discussed in U.S. CODE CONG. & AD. NEWS 1248 (1949); U.S. CODE CONG. & AD. NEWS 2578 (1951).

[23] See, *e.g.*, Errington v. Hudspeth, 110 F.2d 384 (10th Cir. 1940).

[24] See United States *ex rel.* Lowery v. Murphy, 245 F.2d 751 (2d Cir. 1957); Errington v. Hudspeth, *supra* note 23.

[25] See, *e.g.*, United States *ex rel.* LaMarca v. Denno, 258 F.2d 515 (2d Cir. 1958).

[26] *Ibid.*

[27] It is understandable that no opinion will be found which declares that the court is denying any given application on its own initiative, but the fact that appellate courts did deny such applications forces one to conclude that this substantial merit test was a practical reality.

[28] People v. Price, 262 N.Y. 410, 187 N.E. 298 (1933); People v. Gitlow, 234 N.Y. 132, 136 N.E. 317 (1922).

[29] 2 N.Y.2d 278, 140 N.E.2d 357, 159 N.Y.S.2d 480 (1957).

[30] 8 N.Y.2d 177, 168 N.E.2d 527, 203 N.Y.S.2d 84 (1960).

Chronologically, the next case in this development was *People v. Pride*.[33] The court of appeals in passing upon a section of the Buffalo City Court Act[34] which required appealing prisoners to pay for a transcript of the trial, held that section to be unconstitutional as a deprivation of defendant's rights in prosecuting an appeal. It reached this conclusion by comparing the section of the Buffalo City Court Act in question with section 761 of the New York Code of Criminal Procedure, finding them to be in conflict. The court held that whereas the New York Code of Criminal Procedure requires the appellant to serve the district attorney with a copy of the application papers within a specified time, the Buffalo City Court Act so hindered and impeded that requirement as to deny effectively the provided appellate procedures to an indigent unable to obtain the transcript and prepare his appeal. In the *Pride* case, the court reiterated the longstanding position of this state[35] that the right to appeal has been specifically established by statute[36] and must be afforded to the fullest to all petitioners, regardless of financial status. The *Griffin* and *Pride* cases presented a similar factual situation, and it was not surprising that the court in the latter case relied substantially on the *Griffin* decision. The *Pride* case declares the position that an indigent cannot be denied benefit of the statute providing for a copy of the trial transcript merely because of his poverty. It is difficult to see what impact this decision had, if any, on the standing of the "substantial merit" doctrine in New York inasmuch as it merely involved construction of the aforementioned statute. The *Pride* case however, like *Griffin,* had a general liberalizing effect on the courts' thinking in this area. Despite the restricted scope of the actual holding, the decision in the *Pride* case has been cited for the proposition that counsel is an absolute right of an indigent in special appeals.[37]

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[31] People v. Kalan, 2 N.Y.2d 278, 280, 140 N.E.2d 357, 358, 159 N.Y.S.2d 480, 481 (1957).

[32] See People v. Borum, 8 N.Y.2d 177, 168 N.E.2d 527, 203 N.Y.S.2d 84 (1960); People v. Wilson, 7 N.Y.2d 568, 166 N.E.2d 838, 200 N.Y.S.2d 40 (1960); People v. Pride, 3 N.Y.2d 545, 147 N.E.2d 719, 170 N.Y.S.2d 321 (1958).

[33] 3 N.Y.2d 545, 147 N.E.2d 719, 170 N.Y.S.2d 321 (1958).

[34] BUFFALO CITY COURT ACT § 76 (1909) as amended by N.Y. SESS. LAWS 1951 ch. 653; see also BUFFALO CITY COURT ACT § 49 (1909). The latter section specifically provided that an appellant who requires a return of the evidence must pay for it in advance at a rate stipulated in the act.

[35] The court begins the development of New York's position by citing, People v. Cittrola, 213 App. Div. 674, 210 N.Y. Supp. 21 (1925).

[36] N.Y. CODE CRIM. PROC. § 517, which provides that the defendant may appeal *as of right* from a judgment of conviction or an order denying a motion to vacate a judgment—*coram nobis*.

In the same year that the court of appeals considered the *Pride* case, it decided the controversial case of *People v. Breslin.*[38] In the *Breslin* case the question was presented whether the right to counsel was such an absolute right that courts could never deny an application for counsel. The majority held that it was not. The dissenters, Judges Fuld and Dye, maintained that a court was not competent to decide the merits of the appeal on affidavits alone, and thus the right to have counsel prepare a formal hearing of the appeal was an absolute right.[39] It is interesting to note that the dissenters, advocating what is now the prevailing view,[40] were still in the minority as of that late date. The *Breslin* case points up the confusion generated by the decision in *Kalan,* which is cited by both parties brief [41] to support diametrically opposed positions.

In the *Breslin* case the petitioner moved in the appellate division for permission to appeal as a poor person and to have assigned counsel. His motion for counsel was denied.[42] In the majority opinion the court of appeals said, "there is no constitutional or statutory provision which requires the assignment of counsel on appeal to an indigent defendant." [43] The court was dealing specifically with section 308 of the New York Code of Criminal Procedure [44] and in explaining the provision in that section the court stated: "[it] does not require the assignment of counsel on appeal or in any post-conviction proceeding in which a defendant is involved irrespective of the merits of the appeal or application. . . ." [45] The court of appeals took the position in this case that the question of counsel for indigents in post conviction proceedings is one of discretion with the courts, and is not something dictated by statute. The court apparently did not feel compelled by the *Griffin, Pride* and *Kalan* cases to grant counsel, for it carefully distinguished the holdings in those cases from the facts relative to the *Breslin* case.[46]

One statement from the majority opinion in the *Breslin* case deserves special attention. Noting the position of the dissenters, the majority pointed out what it considered the natural consequences of the dissenting position:

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[37] See People v. Breslin, 4 N.Y.2d 73, 149 N.E.2d 85, 172 N.Y.S.2d 157 (1958).

[38] 4 N.Y.2d 73, 149 N.E.2d 85, 172 N.Y.S.2d 157 (1958).

[39] See, Dye, J., dissenting, *id.* at 79, 149 N.E.2d at 88, 172 N.Y.S.2d at 162; Fuld, J., dissenting, *id.* at 80, 149 N.E.2d at 89, 172 N.Y.S.2d at 163.

[40] People v. Borum, 8 N.Y.2d 177, 168 N.E.2d 527, 203 N.Y.S.2d 84 (1960).

[41] Brief for Appellant, p. 9; Brief for Respondent, pp. 14–18, People v. Breslin, 4 N.Y.2d 73, 149 N.E.2d 85, 172 N.Y.S.2d 157 (1958).

[42] 2 App. Div. 2d 876, 156 N.Y.S.2d 1000 (1956).

[43] 4 N.Y.2d at 76, 149 N.E.2d at 86, 172 N.Y.S.2d at 159 (1958).

[44] N.Y. CODE CRIM. PROC. § 308, which generally deals with the right of defendant to be informed of his right to counsel, at the time of his arraignment.

[45] 4 N.Y.2d at 76–77, 149 N.E.2d at 87, 172 N.Y.S.2d at 160 (1958).

[46] *Id.* at 77–78, 149 N.E.2d at 87, 172 N.Y.S.2d at 160–61.

> Our dissenting brethren would mandate the assignment of counsel in every case, no matter how frivolous or meritless the appeal. The same reasoning would require the assignment of counsel in all post-conviction proceedings, such as applications for leave to appeal to this court, habeas corpus proceedings, *coram nobis* and other applications. Many prisoners bring one proceeding after another over long periods of years. The instant case is a clear example of an appeal that has no merit whatsoever. The Appellate Division has found no error in the record before it, nor has counsel whom we assigned on the appeal, nor have we.[47]

In addition, the majority felt the position proposed by the dissenting judges would place an undue burden on the legal community. In speaking of those assigned to look into all these projected appeals the court said: "[it would] make them public defenders at their own expense." [48] Judge Froessel in writing for the majority saw but one solution other than the holding of the majority of the court:

> Unless and until the Legislature acts, the determination of whether counsel should be assigned to post-conviction proceedings in a given case should be left to the court to which the application is made. Such court, whenever appropriate, and with the record available to it and to the defendant, may refuse a request for the assignment of counsel in the proper exercise of discretion. We cannot agree that the courts are unable to discharge their duty to see to it that an indigent defendant is adequately protected.[49]

The majority in the *Breslin* case clearly holds that counsel in post-conviction proceedings such as habeas corpus and coram nobis was a matter wholly within the court's discretion. In those cases in which the court was satisfied that a refusal of the application for assignment of counsel would be a violation of the fair trial doctrine, they could find substantial merit in the appeal and grant the application.

Judge Dye's dissent in the *Breslin* case is premised on the fundamental nature of representation by counsel.[50] This dissent follows the lead of the *Griffin* case by posing and disposing of a "straw-man" issue which was whether the failure to pay counsel is a persuasive factor in the consideration of granting assigned counsel.[51] The position taken by Judge Dye is so similar to the rationale in the *Griffin* case that, carried to its logical conclusion, it amounts to saying: If a wealthy prisoner is able to waste his funds on frivolous attempts to gain his freedom, the right to squander public funds, and those of assigned counsel, on similar vacuous appeals must be guaranteed to indigent defendants.

Judge Fuld's dissent takes the position that, because of the intricacies of the law, unless a prisoner is given counsel to interpret the proceedings leading to his conviction, whatever rights are otherwise guaranteed to defendants become mere sham.[52] The dissent of Fuld answers the argument that his position would create a great burden on counsel with this language: "Be that as it may . . . the court is and should be concerned with the rights of a defendant, not with the inconvenience or burden imposed on attorneys." [53] Finally, the dissent of Judge Fuld undertakes an answer to the language of the *Kalan* case.[54] His opinion attempts to distinguish the holding in *Kalan* and to employ its result to substantiate the position that counsel must be granted at all times. He seeks to establish that the *Kalan* case is not one in which the substantial merit test was applied because the court did not have enough facts before it to find substantial merit. He bolsters this argument with the proposition that had the court truly applied this test it would have had to come to an opposite holding.

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[47] *Id.* at 78, 149 N.E.2d at 87–88, 172 N.Y.S.2d at 161.

[48] *Id.* at 78, 149 N.E.2d at 88, 172 N.Y.S.2d at 161.

[49] *Id.* at 78, 149 N.E.2d at 88, 172 N.Y.S.2d at 161–62.

[50] *Id.* at 79, 149 N.E.2d at 88, 172 N.Y.S.2d at 162.

[51] Judge Dye points to the Lawyer's Oath as substantiation for the fact that this consideration should not be controlling. *Id.* at 80, 149 N.E.2d at 89, 172 N.Y.S.2d at 163.

In the opinions in the *Breslin* case the fine point of controversy is fairly well developed. The majority hold that whenever they see a frivolous or meritless appeal they can effectively terminate it by withholding assignment of counsel. On the other hand, the minority contend that they are not in a position to decide merit or lack of merit from affidavits alone, and that the right to counsel is an essential ingredient to the prosecution of any appeal. Since the right to appeal is provided for in this state, that right must be accompanied by all the safeguards of due process. This latter view sees fruition in the subsequent opinions of the court of appeals.[55]

Following the *Breslin* case, the court of appeals decided the case of *People v. Pitts*.[56] The opinion by Chief Judge Conway indicated the new trend. The appellate division, following *Breslin*, had denied Pitts' application for counsel.[57] In reversing the appellate division, the court of appeals found the *Pitts* case analogous to the *Kalan* decision, and held consistent with the decision in that case. It was markedly impressed by the *Griffin* and *Pride* cases, for it notes:

> [I]n view of the change in constitutional law brought about by the cases of *Griffin v. Illinois* and *People v. Pride*, it is clear that the nature of an Appellate Division order such as the present one is no longer a deterrent to our review of it. Accordingly, we turn to the merits of the appeal. [58]

The opinion does not give any further mention of the "merits" of the petitioner's application. Despite the statement of the court quoted above, it would seem that the decision in the *Pitts* case was reached regardless of the merits of the application. This is borne out by the argument of the court that because of the fundamental nature of the right to counsel it must be granted as a matter of right. Whether the decision in *Griffin* brought about such a change in the constitutional law as the opinion in the *Pitts* case presumes, is uncertain. The court in the *Pitts* case does not clearly articulate the position it is moving towards. On its facts the *Pitts* case is correctly decided but the dictum which attends the decision is not a concomitant to the holding. The case takes on added meaning when read with the decision in *People v. Wilson*,[59] the next case in which the court of appeals spoke on this matter.

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[52] *Id.* at 81, 149 N.E.2d at 89–91, 172 N.Y.S.2d at 163–65.

[53] *Id.* at 82–83, 149 N.E.2d at 90–91, 172 N.Y.S.2d at 164–65.

[54] People v. Kalan, 2 N.Y.2d 278, 140 N.E.2d 357, 159 N.Y.S.2d 480 (1957).

[55] See People v. Borum, 8 N.Y.2d 177, 168 N.E.2d 527, 203 N.Y.S.2d 84 (1960).

[56] 6 N.Y.2d 288, 160 N.E.2d 523, 189 N.Y.S.2d 650 (1959).

[57] 7 App. Div. 2d 728, 182 N.Y.S.2d 1016 (1958).

[58] 6 N.Y.2d at 291, 160 N.E.2d at 524–25, 189 N.Y.S.2d at 652 (1959).

People v. Wilson [60] concerned a petitioner who brought a coram nobis proceeding and applied for the assignment of counsel. The appellate division denied the application.[61] The defendant-petitioner submitted to the court of appeals an affidavit that he was incarcerated, without funds and wholly unable to perfect his appeal because of poverty. The court of appeals reversed the appellate division and granted his application for counsel. The decision in the court of appeals turned on a strict reading of section 517 of the Criminal Code.[62] The rationale was that the right to appeal provided for by this provision of the Criminal Code, is not qualified by any "merits" test and therefore, the court concludes, none can be imposed.[63] This posture is in striking contrast with the holdings in former cases [64] which recognized that some appeals are clearly without merit and that it is futile to allow these vacuous proceedings to receive full formal hearing.

The respondent in the *Wilson* case, the district attorney, posited as his principal contention the position that the defendant's proceeding had no substantial merit and counsel should not be granted to further this useless appeal. Ignoring its dictum in the *Pitts* case,[65] the court of appeals made this response: "Since the controversy now before us necessarily involves *appellate procedure* for a post-conviction legal proceeding, the merits of the *coram nobis* proceeding and the appeal below dismissed are obviously not before us." [66] This holding, explicitly stated for the first time in our courts, is consistent with the tenor of the *Pitts* decision even if it is in conflict with the expressed language of that former case.

It is obvious that this language [67] is fatal to the substantial merit doctrine in New York if this expression truly represents the thinking of the court of appeals. The opinion in *Wilson* is brief and the court either did not recognize that it was overturning the long established merits requirement, or they were merely not very expositive about it. Any doubt that may have lingered after the *Wilson* decision as to the position of the court of appeals on counsel for indigents in post-conviction proceedings, was clarified in the opinion in *People v. Borum* [68] which was handed down soon after the *Wilson* case.

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[59] 7 N.Y.2d 568, 166 N.E.2d 838, 200 N.Y.S.2d 40 (1960).

[60] *Ibid.*

[61] 9 App. Div. 2d 869, 196 N.Y.S.2d 575 (1959).

[62] N.Y. CODE CRIM. PROC. § 517 provides that appeal may be taken, as of right, from a judgment of conviction or an order denying a motion to vacate same (coram nobis).

[63] The court stated: "Section 517 of the code provides that an appeal may be taken *as of right* from a judgment of conviction or from an order denying a motion to vacate a judgment of conviction (*coram nobis* proceeding) . . . The statute makes no distinction and it seems that none was intended." 7 N.Y.2d at 590, 166 N.E.2d at 840, 200 N.Y.S.2d at 41. From this quote the court draws as the rule in *Wilson* that counsel is a requisite in all direct appeals and correlatively it must be so in *coram nobis* proceedings.

[64] See, *e.g.*, People v. Breslin, 4 N.Y.2d 73, 149 N.E.2d 85, 172 N.Y.S.2d 157 (1958).

[65] See note 58 *supra* and accompanying text.

[66] 7 N.Y.2d at 570, 166 N.E.2d at 839, 200 N.Y.S.2d at 41.

[67] See note 66 *supra* and accompanying text.

The destruction of the substantial merit doctrine in New York is completed in the *Borum* decision, in which the court of appeals unequivocally denies to any appellate tribunal the ability to make a judgment as to the merits of a proceeding from a submission of affidavits alone. The court, speaking through the opinion by Judge Fuld, says: "The right to appeal requires a review of the merits upon appeal and is not satisfied by a mere consideration of those merits upon a submission of affidavits on an application for leave to have the appeal heard on the original papers." [69] In this language, the dissent of the *Breslin* case becomes the prevailing majority view of the court of appeals. Although there is no doubt what the present court of appeals holds on the right to counsel in special post-conviction proceedings, it should be noted that the court did not always view its ability to decide a question of merit in an appeal so modestly.[70]

CONCLUSION

Although the law on the question of the right to counsel in special appellate proceedings appears settled, it might be unwarranted, if not improvident, to declare with finality that this is so. In the past the court has assumed a posture through the media of strong dicta only to see this position evaporate in the next decision of the court.

The federal rule has apparently not undergone a similar change, and a substantial merit requirement is firmly established. However, it appears certain that New York does not intend to be bound by whatever vestiges of the merit requirement previously existed in our appellate practice. It is likely that the broad language of the *Wilson* and *Borum* decisions may cause difficulty in the future, and some adjustments will have to be made before the law on this point can be crystallized.

ROBERT P. ROCHE

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[68] 8 N.Y.2d 177, 168 N.E.2d 527, 203 N.Y.S.2d 84 (1960).

[69] It is worthy of note that this opinion further expands the *Wilson* opinion in that it reads section 517 of the Code of Criminal Procedure as an absolute mandate: "[S]ince this statutory right to appeal does not depend upon meritorious points, an appellate court may not insist upon an indigent defendant showing substantial merit. . . ." *Id.* at 178–79, 168 N.E.2d at 528, 203 N.Y.S.2d at 85.

[70] See People v. Richetti, 302 N.Y. 290, 97 N.E.2d 904 (1951), *reversing* 276 App. Div. 1091, 96 N.Y.S.2d 355 (1950). This case discusses the power of the appellate court to decide such matters on affidavits alone.

JOINT EMPLOYMENT UNDER THE NATIONAL LABOR RELATIONS ACT AND THE 1947 ADMENDMENTS THERETO

A, an employee, is controlled and directed in the performance of his work by employer B, but is paid by employer C and performs his work at a building maintained by C. In the event that an unfair labor practice as defined by the National Labor Relations Act[1] is committed against A, by either B or C, or should some question be raised by A's union about which employer it should negotiate with, the following questions may arise: (1) Which of the two employers, B or C, is the employer of A? (2) May both B and C be treated as the joint employers of A?

On several occasions in its comparatively short existence, the National Labor Relations Board has been confronted with the task of solving these and many other related problems.[2] Problems of concurrent employment existed long before the creation of the Board in 1935. Like questions have arisen under most statutes concerned with labor-management relations.[3] Faced with this historical background, the drafters of the NLRA specifically defined the term "employee" as not being limited to the "employees of a particular employer,"[4] thereby recognizing that at times employees might become involved in relationships extending beyond a single employer. The legislative history of the Act evidences this fact.[5] As a logical concomitant to the definition of the term "employee," the word "employer" was defined as being "any person acting in the interest of an employer, directly or indirectly."[6] This broad demarcation has been said to represent a legislative intent aimed at preventing evasion of the Act by the use of an agent or other representative of an employer to act for the latter.[7] Within the general limits of the concepts of "employer" and "employee" established by the Act, there still remained the problem of interpreting and applying these definitions. In so far as sections 2(2) and 2(3) of the National Labor Relations Act spoke of "any employer" and "any employee," it was clear that further formulation of the scope and meaning of these two terms was required. Who was an "employer"? An "employee"? What were the essential components of an "employer-employee" relationship and of a joint employment relationship? For the answers to these questions, reference must be made to the common law master and servant cases and to cases decided under other federal statutes relating to labor. For it was from this body of accumulated case law that the principles and policies of the Board on these matters were to a large extent drawn.[8]

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[1] NATIONAL LABOR RELATIONS ACT, 49 Stat. 449 (1935), 29 U.S.C. § 151, as amended, LABOR MANAGEMENT RELATIONS ACT (Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C. § 151 (1958) [Hereafter referred to as the NLRA].

[2] Wolfe, *Determination of the Employer-Employee Relationships in Social Legislation,* 41 COLUM. L. REV. 1015 (1941).

[3] Similar problems have arisen under the Social Security Act, the Fair Labor Standards Act, the Federal Employers Liability Act, and under the various state Workmen's Compensation Acts.

[4] 49 Stat. 450 (1935), 29 U.S.C. § 152(2), as amended, 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1958).

[5] S. Rep. No. 573, 74th Cong., 1st Sess. 6749 (1935).

[6] 49 Stat. 450 (1935), 29 U.S.C. § 152(2), as amended, 29 U.S.C. § 152(2) (1958).

[7] C. A. Lund Co., 6 N.L.R.B. 423 (1938), *enforced as modified sub nom.* NLRB v. Lund, 103 F.2d 815 (8th Cir. 1939).

THE COMMON LAW INFLUENCES

The traditional master and servant cases of the common law mark the first attempts by the courts to formulate the factors necessary to determine that a relationship of employer-employee existed between two individuals. In *Railroad Co. v. Hanning,*[9] the Supreme Court held that one would be found to be an "employer" where he had the power "not only to direct what shall be done, but how it shall be done." [10] In a later case, *Singer Mfg. Co. v. Rahn,*[11] the same court declared that an employer-employee relationship would exist "whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.' " [12] These rules represent the generally accepted position of the common law on the subject.[13]

One of the more notable of the early cases pertinent to the joint employment problem was *Standard Oil Co. v. Anderson,*[14] which concerned an action for damages for personal injuries. The plaintiff was a winchman who had been appointed and paid by the defendant to perform certain work on the defendant's dock in which a winch owned by the latter was in operation. It appeared that the plaintiff was secondarily supervised in his duties by a stevedore under contract to the defendant, in that the plaintiff obeyed all signals given him by the latter. The defendant had furnished the plaintiff with his place of work and his tools. It was adjudged that the defendant was the plaintiff's employer since he had selected and paid him and had the right to discharge him. The giving of the signals was said to evidence mere cooperation between the plaintiff and the stevedore, and not control of the former by the latter. In arriving at this result, the court said:

> It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished.[15]

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[8] See generally Stevens, *The Test of the Employment Relation,* 38 MICH. L. REV. 188 (1939).

[9] 82 U.S. (15 Wall.) 649 (1872).

[10] *Id.* at 657.

[11] 132 U.S. 518 (1889).

[12] *Id.* at 523.

[13] See Restatement (Second), Agency § 220 (1958). See also Bartels v. Birmingham, 332 U.S. 126 (1947).

[14] 212 U.S. 215 (1909).

[15] *Id.* at 221.

Although the *Anderson* case is not strictly a joint employment case, its acknowledgment of the concept of a general and a special employer, with its indication that one's "employer" can only be identified after a consideration of the particular facts at hand, has undoubtedly served as a guiding principle in such cases.[16] Such master and servant cases, therefore, considered one to be an employer when he had the right to control a worker both as to the result and as to the means of its accomplishment; and, as a logical correlative, a worker so situated with respect to the employer was considered to be an employee.

DECISIONS UNDER THE FEDERAL LABOR STATUTES

The courts, in deciding cases involving violations of the Social Security Act,[17] have recognized the possibility that a dual employment situation might exist. As a result, in disposing of such cases, the courts have employed such common law tests as control and the payment of wages.[18] It has been said that the term "employee" as used in the Social Security Act is not a term of art and that its content and context must be construed in the light of the mischief to be corrected and the end to be attained.[19] An "employee" is defined by the Act as "one who is subject to the control of his employer with respect to what shall be done and as to how it shall be done." [20] This definition has been held merely to reiterate the common law.[21] The Act also uses the terms "employer" and "employment" in their traditional common law sense.[22]

A case illustrating this point is *Aberdeen Aerie No. 24 of Fraternal Order of Eagles v. United States*.[23] In this case members of an orchestra hired by the Aerie were claimed to be employees of the latter. The orchestra was found to be under the operation of its leader and performing by virtue of a contract between the Aerie and the leader by which the latter was paid all sums owed for the orchestra's services. The Aerie, on the other hand, lacked the right to select or discharge any of the musicians and it did not furnish their instruments nor control their performance. The court held that under the facts the leader was the sole employer of the musicians and that the Aerie was not an employer.

Under the Fair Labor Standards Act,[24] an "employee" is defined simply as "any individual employed by an employer," [25] and "employ" is defined as "to suffer or permit to work." [26] *Walling v. Saunders,*[27] a case decided under this Act, concerned the relationship between the employer and drivers hired by salesmen of the employer, without the consent of the latter, which the "employer" had "suffered" to happen within the meaning of the Act. The court said that the lack of independent authority by the employer to hire or fire such drivers, coupled with his lack of any control over them, showed that he was not their employer. The mere fact of the employer's sufferance did not prove that the driver worked for him. The court refused to construe the term "employee" "so as to include not only those who work for an accused employer, but also those who work for anybody else. Manifestly this would encompass all employed humanity." [28]

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[16] See generally note 2 *supra*.

[17] 49 Stat. 620 (1935), as amended, 42 U.S.C. § 301 (1958).

[18] See Crossett Lumber Co. v. United States, 79 F. Supp. 20 (W.D. Ark. 1948), which reviews the experience under the Social Security Act.

[19] United States v. Silk, 331 U.S. 704 (1947).

[20] Treas. Reg. § 31.3401(c)-1(b) (1957).

[21] Anglim v. Empire Star Mines Co., 129 F.2d 914 (9th Cir. 1942).

[22] Los Angeles Athletic Club v. United States, 54 F. Supp. 702 (S.D. Cal. 1944), *appeal dismissed*, 144 F.2d 352 (9th Cir. 1944).

[23] 50 F. Supp. 734 (W.D. Wash. 1943), *aff'd*, 148 F.2d 655 (9th Cir. 1945).

[24] 52 Stat. 1060 (1938), as amended, 29 U.S.C. § 201 (1958).

[25] 52 Stat. 1060 (1938), as amended, 29 U.S.C. § 203(e) (1958).

The Supreme Court has held that the definition of "employer" and "employee" in the Federal Employers Liability Act is merely descriptive of the traditional common law relation of employer and employee.[29] The state Workmen's Compensation Acts have also considered the question of joint employment, with primary emphasis on the immediate right of control over the workers in the performance of their everyday duties.[30] Undoubtedly all of these sources have had some influence in the formulation of the terminology of the original NLRA and the 1947 amendments to the NLRA.[31]

The predominant purpose of the National Labor Relations Act of 1935 was "to compel employers to bargain collectively with their employees to the end that employment contracts binding on both employer and employee should be negotiated." [32] Tactics by an employer to evade his responsibilities under the NLRA were to be prohibited.[33] As mentioned above,[34] it soon became necessary for the Board to define the factors necessary to the existence of an employer-employee relationship. In *Roane-Anderson Co.,*[35] the Board declared some of these factors to be "complete control over the hiring, discharge, discipline, and promotion of employees, rates of pay, supervision, and determination of policy matters." [36] This test clearly adds little to the common law tests previously discussed.[37]

THE PRE-HEARST EXPERIENCE: 1935–1944

In order to understand the interpretation of the NLRA, it is necessary to analyze the case law prior to the impact of the important decision in

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[26] 52 Stat. 1060 (1938), as amended, 29 U.S.C. § 203(g) (1958).

[27] 136 F.2d 78 (6th Cir. 1943).

[28] *Id.* at 81.

[29] Robinson v. Baltimore & O.R.R., 237 U.S. 84 (1915).

[30] See, *e.g.*, Balinski v. Press Publishing Co., 118 Pa. Super. 89, 179 Atl. 897 (1935); Essex County Country Club v. Chapman, 113 N.J.L. 182, 173 Atl. 591 (1934).

[31] See, *e.g.*, NLRB v. John W. Campbell, Inc., 159 F.2d 184 (5th Cir. 1947); NLRB v. Long Lake Lumber Co., 138 F.2d 363 (9th Cir. 1943), which refers to the Social Security Act.

[32] NLRB v. Scullin Steel Co., 161 F.2d 143, 146 (8th Cir. 1947).

[33] C. A. Lund Co., 6 N.L.R.B. 423 (1938), *enforced as modified sub nom.* NLRB v. Lund, 103 F.2d 815 (8th Cir. 1939).

[34] See text accompanying notes 7 and 8 *supra.*

[35] 95 N.L.R.B. 1501 (1951).

[36] *Id.* at 1503.

[37] See notes 9–13 *supra* and accompanying text.

NLRB v. Hearst Publications, Inc.[38] in 1944. One of the earliest cases dealt with by the Board, *C. A. Lund Co.*,[39] evoked from the reviewing circuit court the following declaration of policy: "[W]hoever . . . in the capacity of an employer controls the employer-employee relations . . . *is the employer* . . . [and] it can make no difference in determining what constitutes an appropriate unit . . . whether there be *two* employers of *one* group of employees or one employer of two groups of employees." [40] This principle was applied in *United States Testing Co.*,[41] in which the following factual situation was presented: A research worker toiled on the premises of the respondent company with the latter's employees and had the same hours, vacations, and working conditions that they had. He was hired subject to respondent's approval and was generally controlled by the latter. Although the research worker was on loan from his regular employer who had reimbursed the respondent for all wages paid to him, the respondent company was held to be the research worker's employer for the purpose of requiring him to be included in a bargaining unit made up of the company's laboratory workers.

One of the earliest indications of a tendency on the part of the NLRB to depart from the strict rules of the common law in determining whether an employer-employee relationship exists is found in the language of the Board in the *Seattle Post Intelligencer* case.[42] In that case the Board stated:

> The primary consideration is whether effectuation of the declared policy and purposes of the Act comprehends securing to the individual the rights guaranteed and protection afforded by the Act. The matter is not conclusively determined by a contract which . . . purports to establish the status of such person other than as an employee. Public interest in the administration of the Act permits an inquiry into the material facts and substance of the relationship.[43]

The question whether one was an "employee," therefore, could be answered only by a consideration of the policies and purposes of the Act used in conjunction with the traditional common law tests of employment.[44]

One of the Board's earliest experiences with a joint employment situation, following the development of these principles, was in the case of *Sierra Madre-Lamanda Citrus Ass'n.*[45] In that case, a complaint had been filed by a citrus workers' union against the respondent association alleging unfair labor practices. The respondent's answer averred that the fifteen workers involved were not his employees. The evidence disclosed that the respondent had entered into a contract with one Betz, an independent contractor, whereby the latter was to pack the respondent's fruit for a season, and was to employ and have full control of all labor. The respondent was to pay all wages for such labor, furnish them with working space in his plant, and was to superintend and inspect their work through its agents. The workers could not be hired without the respondent's approval. The laborers were to be carried on Betz's payroll and Betz was to pay them, subject to reimbursement by the Association. All payroll deductions were made by Betz. There was evidence showing that in practice the respondent retained control over the workers secondary to Betz and that the former's agents often told Betz of errors they had observed in the work. It was held that Betz was acting in the respondent's interest within the meaning of section 2(2),[46] and that Betz and the respondent were joint employers of the workers due to the division of control that they exerted over the workers.

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[38] NLRB v. Hearst Publications, 322 U.S. 111 (1944).

[39] 103 F.2d 815 (8th Cir. 1939), *enforcing as modified*, 6 N.L.R.B. 423 (1938).

[40] 103 F.2d at 819. (Emphasis added.)

[41] 5 N.L.R.B. 696 (1938).

[42] 9 N.L.R.B. 1262 (1938).

[43] *Id.* at 1274–75.

[44] See Teple, *The Employer-Employee Relationship*, 10 OHIO ST. L.J. 153, 155–56 (1949).

[45] 23 N.L.R.B. 143 (1940).

It is important to note that the "control" referred to in the *Sierra Madre* case and other cases under the Act is not strictly synonymous with the "ultimate control" spoken of at common law.[47] This fact is illustrated in the case of *Bethlehem-Fairfield Shipyard, Inc.*,[48] which involved a dispute between two employers as to their respective duties toward a group of cafeteria workers. It appeared that the respondent shipyard had contracted with an independent contractor, who operated a restaurant chain, for the latter to operate a cafeteria on the respondent's premises. The respondent was obligated to indemnify the contractor against any business losses incurred and was to furnish all facilities to the contractor. The contractor agreed to furnish all employees, to pay them according to the respondent's wage policies, to carry them on his own payroll records and to make all deductions and payroll reports. The contractor exercised his right to control the employees in the performance of their duties. He also agreed to discharge any employee unsatisfactory to the respondent and to allow the respondent to establish the working hours of the employees. Notwithstanding the seemingly greater measure of control in the contractor, the respondent was found to be the employer of the workers because the contract vested in him the "right of control" over the supervision and operation of the cafeteria. Whether the control enjoyed by the respondent would satisfy the "ultimate control" or "ultimate right of control" test of the common law seems open to doubt.[49]

The next important joint employment case following the *Sierra Madre* case was *Butler Bros. v. NLRB*.[50] The petitioner in the case had subcontracted the maintenance and janitorial work at his place of business to a service company. Under the contract the service company fully insured the employees provided for the work. Monthly compensation was paid to the service company by the petitioner equalling in amount the latter's payroll costs for the work. Most of the employees' work was directed by the petitioner, and the compensation paid by the latter to the service company comprised the fund out of which the workers' wages were paid. The court held that the two were joint employers of the workers within the meaning of section 2(2) of the NLRA. The court formulated three factors as being relevant in determining whether a person was an employer within the meaning of the NLRA: first, the extent of the control exercised by one employer over persons working for another, with respect to hiring, firing, duties and working schedule; second, the payment of the other's help by the employer in question; and third, the similarity in hours, work and working conditions between the first employer's regular help and the help of the second employer.[51]

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[46] *Id.* at 150.

[47] Teple, *The Employer-Employee Relationship,* 10 OHIO ST. L.J. 153, 155–56 (1949).

[48] 53 N.L.R.B. 1428 (1943). *But see* Rath Packing Co., 101 N.L.R.B. 96 (1952).

[49] See generally MacMillan, *The Law of Labor Relations* 124–25 (1951).

[50] 134 F.2d 981 (7th Cir.), *cert. denied,* 320 U.S. 789 (1943).

In *NLRB v. Gluek Brewing Co.*,[52] the circuit court upheld a Board ruling that held the Gluek Company responsible for the unfair labor practices effected through the acts of one Bach, an independent contractor, and the latter's employees. In the *Gluek* case the Board had found that the employer had retained substantial control over the delivery of its own products, the work and conditions of employment of the drivers and helpers of the independent contractor, and their tenure of employment under the agreement between them. The court held that common law or statutory concepts of legal relationships must yield to the extent that it is necessary to effectuate the purposes of the Act, and that even if Bach be an independent contractor, this fact would not protect the employer from liability for committing unfair labor practices if the purpose of the living arrangement was forbidden interference in labor matters.[53]

The years 1935 to 1944, therefore, witnessed the manifestation by the Board and reviewing courts of a relatively liberal attitude toward the common law concepts of agency and a broadening of master and servant principles, especially the "ultimate right of control" test. In 1944 this gradual liberalization of the traditional principles of this area reached its peak.

THE HEARST CASE AND ITS EFFECT: 1944

In the leading case of *NLRB v. Hearst Publications, Inc.*,[54] the Supreme Court ruled that full-time newsboys selling newspapers at fixed street locations were employees of the various newspapers for whom they worked, and not independent contractors as the companies insisted. The basis of the decision was grounded in the newspapers' control of several aspects of the newsboys' work. The circuit court, applying common law tests, had found the boys to be independent contractors. The court, after noting that the policy of the NLRA was designed to eliminate the causes of industrial unrest, said:

> In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought . . . by the legislation . . . [such] characteristics . . . outweigh technical legal classification . . . and bring the relation within

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[51] *Id.* at 984–85.
[52] 144 F.2d 847 (8th Cir. 1944).
[53] *Id.* at 855.
[54] 322 U.S. 111 (1944).

> its protections. . . . Determination of "where all conditions of the relation require protection" involves inquiries for the Board charged with this duty.[55]

The definition of "employee" was, therefore, not to be confined to common law standards, and economic realities were to be given weight in arriving at a resolution of this question. Whether one was an "employee" was a question of fact, and the expertise of the Board in its factual analysis was to be relied on. The decision lent added weight to a series of Board decisions that had accorded the protection of the Act to people who presumably would have been regarded as independent contractors at common law.[56] The meaning of the term "employee" thereafter would depend upon its factual background, and under the Act it was to be read in a broad and comprehensive manner.[57] Moreover, the Board, in arriving at its decisions, was to be accorded reasonable freedom in drawing inferences from established facts, and such decisions were to be given considerable weight.[58] Typical of the cases decided in this period is the decision in *NLRB v. E. C. Atkins & Co.*[59] In that case guards at a wartime defense plant who had been formally inducted into the United States Army and were subject to military supervision and regulation in the performance of their duties, were held to be the employees of the civilian company that owned the plant and paid their wages. Although it was not strictly necessary to the decision,[60] the court reaffirmed its view that the Board's determinations were not limited by the rules of the common law. This "economic reality" theory of employment promulgated by the *Hearst* case reappeared in the case of *Bartels v. Birmingham*,[61] which was decided even as the 1947 amendments to the NRLA were being drafted.

THE 1947 AMENDMENTS: THE REASONS FOR THE CHANGES

The broad language employed by the Supreme Court in the *Hearst* case, with respect to the status of newsboys who would have been independent contractors by the rules of the common law, was treated by the Board and the lower courts in the cases that arose after *Hearst* as having extended the protections of the NLRA to independent contractors.[62] In addition, the Court's ruling in the *Hearst* case had the effect of reinforcing prior Board decisions favoring coverage of independent contractors.[63] The Court had also held that the question as to whether one was an "employee" was one of fact to be resolved by the experts comprising the Board.[64] The 1947 amendments to the Act, officially designated as the Labor Management Relations Act [65] or, as it is more commonly known, the Taft-Hartley Law, was an obvious response to criticisms directed to these parts of the *Hearst* holding and to the results caused by them. The broad scope given the term "employee" in the *Hearst* case came in for special criticism by the Senate Committee on Education and Labor. A report of the committee stated:

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[55] *Id.* at 127, 128, 130.

[56] See, *e.g.*, American Steel Scraper Co., 29 N.L.R.B. 939 (1941); Schult Trailers, Inc., 28 N.L.R.B. 975 (1941); Jahn & Ollier Engraving Co., 24 N.L.R.B. 893 (1940); Schwarze Elec. Co., 16 N.L.R.B. 246 (1939); Swift & Co., 15 N.L.R.B. 992 (1939), *enforced*, 116 F.2d 143 (8th Cir. 1940); American Oil Co., Inc., 14 N.L.R.B. 990 (1939), *enforced as modified*, 114 F.2d 1009 (4th Cir. 1940); Frost Rubber Works, 23 N.L.R.B. 1071 (1940); California Walnut Growers Ass'n, 18 N.L.R.B. 493 (1939).

[57] NLRB v. Armour & Co., 154 F.2d 570, 574 (10th Cir. 1945), *cert. denied*, 329 U.S. 732 (1946).

[58] Republican Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945).

[59] 331 U.S. 398 (1947).

[60] By the time the case reached the Supreme Court the war had ended and some guards, after being demilitarized, remained on as ordinary plant guards. The Court stated, however, that the changed circumstances did not affect its holding.

[61] 332 U.S. 126 (1947). See also United States v. Silk, 331 U.S. 704 (1947) (Social Security Act); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (Fair Labor Standards Act), for illustrations of the "economic reality" approach.

> An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of the members of the National Labor Relations Board, means someone who works for another for hire.
>
> It must be presumed that when Congress passed the Labor Act, it intended the words it used to have the meaning that they had when Congress passed the Act, not *new meanings* that, nine years later, the Labor Board might think up.[66]

Congress, dissatisfied with the liberal interpretations put on the word "employee" in the *Hearst* case and the cases that followed it, notably the *Atkins* case, sought by the amendments to return to the ordinary common law definition of that term.[67] A second source of dissatisfaction with *Hearst*—its ruling that the problem of employee status was a question of fact—was also remedied. In the words of Senator Taft: "The legal effect of the amendments therefore is merely to make it clear that the question whether or not a person is an employee is always a question of *law*, since the term is not meant to embrace persons outside that category under the general principles of the law of agency." [68]

In accordance with these views, Congress in the amendments revised the definitions of the terms "employer" and "employee" and added a completely new section to the NLRA defining the word "agent." The section defined "employer" to include "any person acting as an agent of an employer, directly or indirectly. . . ." [69] It will be noted that the clause in the original NLRA as to "any person acting in the interest of an employer. . . ." [70] was not used in the amendments. An "employee" was described as including "any employee, and shall not be limited to the employees of a particular employer . . . but shall *not* include . . . any individual having the status of an *independent contractor*. . . ." [71] No such exclusion appeared in the original definition. An "agent" as referred to in the term "employer" may be found to exist in accord with the following rule: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." [72] The last subsection has been said to have the effect of making both employees and unions liable for the acts of their agents according to the ordinary common law rules of agency,[73] except that the approach to the questions of authority and ratification is less stringent.[74]

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[62] See text accompanying notes 56–60 *supra*. See generally H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947); MACMILLAN, THE LAW OF LABOR RELATIONS 124–25 (1951).

[63] See note 56 *supra* and accompanying text.

[64] See text accompanying note 58 *supra*.

[65] 61 Stat. 136 (1947), *as amended*, 29 U.S.C. § 151 (1952) [hereinafter referred to as the LMRA].

[66] H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947). (Emphasis added.)

[67] *Ibid.*

[68] 93 Cong. Rec. 6441–442 (1947). (Emphasis added.)

[69] 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1958).

[70] 49 Stat. 450 (1935), 29 U.S.C. § 152(3).

The exact effect of these amendments upon the *Hearst* rule, which allowed the courts to consider the "economic realities" of the situation in dispute, remains in doubt. Since the amendments are silent upon this point, and since an examination of the purposes and policies to be effected by a statute has always been considered as an essential part of the court's interpretation of the same, it is submitted that this rule has not been wholly abrogated. The main purpose of the LMRA seems to be the achievement of greater adherence on the part of the Board and the courts to the general principles of the law of agency. Certainly there is nothing in the history of the amendments, or in the amendments themselves, indicative of a legislative intent to make the common law rules the exclusive criteria to determine whether or not one is an "employee" under the LMRA. Section 152(13) of the NLRA, as amended by the LMRA, concerning "agents" and their authority to act, deviates slightly from the common law rules. The reasonable inference to be drawn from these considerations is that the reasoning of the *Hearst* case still retains some of its original influence in this field.

As in the case of the original definitions of "employer" and "employee," the amended definitions of these terms called for further formulation of their scope by the Board and the courts. Accordingly, in *NLRB v. Steinberg*,[75] an "employer" was defined as one who had the "right to control and direct the work, not only as to the result to be accomplished by the work, but also as to the manner and means by which it was to be accomplished." [76] The court also stated that the right, and not the exercise of control, was the decisive factor.[77] The terms "employee" and "independent contractor" as used by the LMRA were also delimited in cases arising shortly after the amendments. In *Kansas City Star Co.*,[78] an

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[71] 61 Stat. 137, 138 (1947), 29 U.S.C. § 152(3) (1952). (Emphasis added.)

[72] 61 Stat. 137 (1947), 29 U.S.C. § 152(13) (1952).

[73] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 11 (1947); *cf.* cases cited note 56 *supra*.

[74] See generally Klee v. United States, 53 F.2d 58, 61 (9th Cir. 1931).

[75] 182 F.2d 850 (5th Cir. 1950).

[76] *Id.* at 857.

[77] 182 F.2d at 857.

[78] 76 N.L.R.B. 384 (1948).

"employee" was described as "one who works for wages or a salary under direct supervision." [79] An "independent contractor" within the meaning of the term "employee" has been characterized as one who undertakes to do a job for a price, decides how the work is to be done, determines how others are to do it, and derives income by computing the difference between the profits from the end result, less the costs of labor and materials.[80]

EXPERIENCE UNDER THE LMRA: 1947—

Since independent contractors were expressly excluded from the coverage of the LMRA, one of the first effects of the amendments with respect to joint employment cases was an attempt by employers to create employer-independent contractor relationships between themselves and their workers. It was promptly held that the courts were not bound by labels, and if the group in question performed duties in the manner employees normally perform, the group would be treated as employees within the meaning of the LMRA.[81] A case illustrating this practice by employers is *San Marcos Tel. Co.*[82] In the *San Marcos* case, the clerical work of the respondent company had been contracted out to independent contractors. The latter selected the clerks and had the right to dismiss them and direct their work. He also drew up the payroll and computed all deductions, including any payroll taxes that were levied. The clerks, however, worked in the respondent's offices and used its equipment, and the company reimbursed the contractor for the clerks' salaries. In a NLRB proceeding, commenced by a labor organization claiming to represent the clerical workers, the respondent company claimed that the contractor was the sole employee. The Board, applying the "right of control" test and giving considerable weight to the fact that the clerical workers had become an integral and functional part of the respondent's communication service, found that the respondent company was the employer of the workers. This finding was also based upon the facts that the respondent indirectly paid the clerks, had the right to control the manner and means of the clerks' performance, and could terminate the contract relationship without subjecting itself to liability, and upon the fact that the clerks used the respondent's equipment and performed their duties on its premises.

Since the 1947 amendments to the NLRA, the Board's decisions indicate considerably stricter adherence to the rules of the common law regarding the employer-employee relationship,[83] but the position of the federal courts as to the use of the common law rules in preference to the *Hearst* rule is still in doubt.[84] Uncertainty also exists as to the question of whether the degree of "control" necessary to find one to be an employer is the same thing under the LMRA as the common law "ultimate right of control." [85] Another problem is the legal effect of an employer's carrying of workers on his payroll as his employees and his computation of the deductions from their pay for social security and withholding tax purposes, as required by law.[86] The *San Marcos* case [87] indicates that, at least for the purpose of the LMRA, such acts are evidence of an employment relationship, but that they are not, in themselves, controlling.

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[79] *Id.* at 388.

[80] NLRB v. Steinberg, 182 F.2d 850, 855 (5th Cir. 1950).

[81] NLRB v. Phoenix Mutual Life Ins. Co., 167 F.2d 983 (7th Cir.), *cert. denied,* 335 U.S. 845 (1948).

[82] 81 N.L.R.B. 314 (1949). See also Girdler Corp. & Office Employees, 96 N.L.R.B. 894 (1951), where stenographers on loan to the Atomic Energy Commission were found to be employees of the Commission because of the latter's control over them. See NLRB v. Nu-Car Carriers, Inc., 189 F.2d 756 (3d Cir. 1951), *cert. denied,* 342 U.S. 919 (1952), where the court discusses the effect of the LMRA on the right-of-control test.

[83] See, *e.g.,* International Ladies' Garment Workers' Union, AFL v. NLRB, 237 F.2d 545 (D.C. Cir. 1956).

Another question concerns the weight to be given to a finding of the Board that a particular person is an employer. The *Hearst* case had advocated the giving of great weight to decisions of the Board on the matter.[88] Formerly the Supreme Court had said that whether the Court would reach the same conclusion as the Board from conflicting evidence was immaterial, and the Court's disagreement with the Board's finding would not allow the Court to disregard the statutory division of authority.[89] Apparently the Court's view as to the weight to be given the Board's findings has not changed to any great degree. In *Truitt Mfg. Co. v. NLRB*,[90] the Supreme Court indicated that since the Board is an administrative body established primarily for the purpose of investigating and deciding cases such as the one at bar, and since the Board is continually making determinations of the existence or nonexistence of employer-employee relationships, its findings should be given considerable weight provided they are based on substantial evidence. Moreover, the Court maintained that it is for the Board to draw inferences from the evidence and when these inferences are fairly drawn from the facts of the case, they should not be disturbed by the courts.[91] The tenor of these remarks indicates the Court's recognition that the question of the sufficiency of the evidence to establish an employer-employee relationship is a question of law subject to judicial review. It may be concluded, however, that the Court's attitude toward the Board's decisions is substantially the same as it was prior to the enactment of the LMRA.

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[84] See, *e.g.*, NLRB v. Nu-Car Carriers, Inc., 189 F.2d 756 (3d Cir. 1951), *cert. denied*, 342 U.S. 919 (1952) (common law test employed); National Van Lines v. NLRB, 273 F.2d 402 (7th Cir. 1960) (*Hearst* test employed); NLRB v. Texas Natural Gasoline Corp., 253 F.2d 322 (5th Cir. 1958) (*Hearst* rule applied). The court of appeals for the District of Columbia is said to be openly divided on the question, with some tendency to favor the common law rule.

[85] See note 44 *supra* and accompanying text.

[86] Int. Rev. Code of 1954, §§ 6011, 6051; Int. Rev. Regs. §§ 406, 500, 406.600–406.607 (1954).

[87] San Marcos Tel. Co., 81 N.L.R.B. 314 (1949).

[88] NLRB v. Hearst Publications, 322 U.S. 111 (1944). It should be noted that the sufficiency of the evidence presented in that case was not in issue.

[89] NLRB v. Link Belt Co., 311 U.S. 584, 597, 600 (1940).

[90] 351 U.S. 149 (1956).

[91] *Id.* at 151–54.

The Most Recent Joint Employment Cases

A 1960 decision, *All Boro Metal Products Co.,*[92] involved the status of warehousemen supplied to the respondent by a service organization known as Office Help Temporaries. While on the job, the workers were supervised by respondent's agents, and their working conditions approximated those of the company's regular employees. These workers were paid by the service company out of a fund supplied to them by All Boro. It was held that in effect the respondent was paying the men. As a result they were considered to be All Boro's employees. A contemporaneous case is *Panther Coal Co.,*[93] in which the owner of some mines had an arrangement whereby independent operators operated his mines. With respect to each mine, he assumed the status of joint employer with each of the independent operators and had the right to control to a reasonable extent the hiring, firing, transfer, and working conditions of their employees. Notwithstanding the mine owner's control, it was held that the independent operators were the appropriate unit to bargain with. It is submitted that this holding is difficult to reconcile with the common law concept of the "ultimate right of control."

Conclusion

The obvious requirements for a joint employment situation to exist are: first, two employers, either of whom may possibly be the employer of the workers in question; second, a group of workers who are "employees," in that they work for wages or salary under direct supervision, unlike independent contractors, who are subject to remote supervision only; and, third, some division of control over the employees between the employers so that they both assume certain specified rights and duties towards the employees in substantially equal measures. One will be the "employer" of an individual if he has the right to direct that individual both as to the result to be accomplished and as to the means of its accomplishment. If one employer is the second employer's agent, then the latter is the worker's employer. If the employees of the first employer are serving the special purposes of the second, the latter is their employer for that occasion within the meaning of the present Act. It seems readily apparent that the interpretations placed on the terms "employer" and "employee" under both the original and the amended NLRA are mere reiterations of traditional common law definitions of those terms. It was the "economic realities" doctrine of the *Hearst* case that first introduced an additional factor into these interpretations, a factor which yet lingers in cases under the present Act to an indefinable degree. Of all the joint employment cases presented herein, it appears that only the *Sierra Madre* case fully meets the comprehensive test of the joint employment relation announced in the *Butler Bros.* case.

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[92] 126 N.L.R.B. 1141 (1960).

[93] 128 N.L.R.B. No. 45 (1960). See also Crestline Co. v. Midwestern Millmen, — N.L.R.B. — (1960).

This fact is worthy of some note, for even the *Butler Bros.* case, in its finding of joint employment under the facts there presented, seems to be in conflict with the later *San Marcos, Girdler,* and *All Boro* cases, and would thus appear to be of dubious authority at present. Even though the *Sierra Madre* case presents a comprehensive test to determine whether a joint employment relation exists, it has been rarely cited as an authority. Coupled with these facts is the fact that apparently not one case of recent years has held two employers to be joint employers.

Under the LMRA, with its common law definition of an "employer," it seems reasonably certain that in a case involving two employers only one of these could fully satisfy the definition, and that one would be held as the employer responsible. Since the only other type of "employer" referred to is one acting as an employer's "agent," thereby calling for the use of the usual agency rules, subject to the modifications thereto appearing in the LMRA, it would seem that the joint employment status spoken of in the earlier cases under the NLRA, will no longer be recognized. This conclusion is fortified by a view of the tenacious process employed by the Board and the courts in the most recent cases arising in this connection in finding that one of the two employers involved was the "real" employer of the workers involved. The concept of joint employment, for the purposes of the present Act, therefore, appears to be of historical import only.

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SELECTED SECURITIES ACT EXEMPTIONS

Since the passage of the Securities Act in 1933 the legal prerequisites to the offering of securities for sale have become very complex. The technicality of this Act and the cost of registering securities have caused the Securities Act exemptions to assume great importance. Any lawyer who has occasion to counsel small businesses in relation to the raising of capital should be familiar with the methods available to offer securities in public or private sale without direct supervision of the Securities and Exchange Commission.[1]

SMALL ISSUES

Regulation A of the Commission [2] grants an exemption from the registration requirements of the Act where an *issue* of securities is offered to the public at an aggregate amount that does not exceed $300,000.[3] Although a plan of financing encompasses several seemingly distinct transactions, it may constitute but a single issue of securities for the purposes of the Act. In a situation where the plan constitutes a single issue, the entire plan must qualify for the exemption. In *Unity Gold Corp.*,[4] a case illustrating this point, it was argued that an immediate purchase for cash of 75,000 shares of stock constituted an issue separate from an option contract executed at the same time for additional shares. The Commission held, however, that both the cash and option purchase were part of the same issue and that the cash sale should also have been registered. The test applied was whether the securities were of the same class and were offered on the same general terms in an uninterrupted program of distribution.[5]

In satisfying the monetary limitation, the issuer does not necessarily obtain an exemption because its purchaser will pay less than $300,000 for the securities. Where underwriters make a purchase for resale to the public, the offering price to the public is the determining factor, not the price to be paid by the underwriter.[6] Thus underwriters who pay less than $300,000 for the issue may cause the exemption to be lost if they resell for more than that amount.[7]

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[1] Hereinafter referred to as the Commission.

[2] 17 C.F.R. § 230.254 (Supp. 1959). "Regulation A" is the general term applied to all the provisions in the Regulations regarding the exemption.

[3] 59 Stat. 167 (1945), 15 U.S.C. § 77c(b) (1958). This legislation empowered the Commission to grant the exemption. Opinions have differed as to what the offering price maximum ought to be. Although various amounts ranging between $100,000 and $1,000,000 have been suggested, the figure of $500,000 has received more support in recent years. See CHOKA, SECURITIES REGULATION 29 (1958); LOSS, SECURITIES REGULATION 164 (Supp 1955); 25 SEC ANN. REP. 10 (1959).

[4] Unity Gold Corp., 3 S.E.C. 618 (1938).

[5] The uninterrupted program of distribution here constituted a disposition of 600,000 shares by two contracts executed on the same day. Although the contracts were executed in March, 1937, an option granted by one of them would not have been completely exercised until January, 1941.

[6] 59 Stat. 167 (1945), 15 U.S.C. § 77c(b) (1958); 17 C.F.R. § 230.254(a) (Supp. 1959); *cf.* Mines & Metals Corp. v. SEC, 200 F.2d 317 (9th Cir. 1952).

[7] LOSS, SECURITIES REGULATION 168 (Supp. 1955).

For purposes of the Act, the "aggregate" offering price to the public has a technical meaning. It may, in certain circumstances, consist of an amount greater than the price to be paid for the proposed issue. If at the time this new offer is made, securities of a previous issue are still being offered pursuant to this exemption, the offering price of the former issue must be added to that of the new issue in order to compute the aggregate offering price.[8] The same is true where a previous issue was offered and sold under this exemption within one year of the date of the new offering.[9] In addition, the offering price of issues offered within one year from the date of the new offering by persons controlling or controlled by the issuer must be added to the price of the proposed issue.[10] Where the above circumstances exist, if the offering price of the proposed issue as increased by the described additions exceeds $300,000, the exemption is not available.

Satisfaction of the requirements pertaining to this exemption does not free the issuer from all Commission control. Despite the fact that formal registration is not required there are disclosure provisions in the Regulations that must be complied with. At least ten days prior to the initial offering date, the issuer must file a notification and an offering circular containing specified information with the regional office of the Commission.[11]

PRIVATE OFFERINGS

Transactions by an issuer not involving any public offering are also exempt from the registration provisions of the Act irrespective of the amount at which the issue is offered.[12] Since the Commission has stated that securities offered privately cannot be exempt if any securities comprised within the same issue have been offered to the public,[13] an entire issue must qualify for this dispensation.[14] One example of a transaction that constituted separate issues was the subject of a Commission release.[15] A proposed exchange of Series B bonds for oustanding securities and a sale of Series C bonds to twelve insurance companies were deemed by the Commission to be separate issues because they differed substantially from each other and were of different classes. Even though the bonds were part of the same refinancing plan and would be secured by the same open-end mortgage, the two series constituted separate issues. This finding permitted the Series B bonds to be exempt as an exchange and the Series C bonds to constitute a private offering.

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[8] 17 C.F.R. § 230.254(a)(1) (Supp. 1959).

[9] 17 C.F.R. § 230.254(a)(2) (Supp. 1959). See also 17 C.F.R. § 230.254(a)(3) (Supp. 1959) which requires the inclusion of all securities sold in violation of the Act within one year prior to the commencement of the proposed offering.

[10] 17 C.F.R. § 230.254(a) (Supp. 1959). Such a person is called an "affiliate" by 17 C.F.R. § 230.251 (Supp. 1959). See also CHOKA, SECURITIES REGULATION 30 (1958).

[11] 17 C.F.R. § 230.255(a) (Supp. 1959). See 17 C.F.R. § 230.256(a)(1),(2) (Supp. 1959). This section requires the offering circular to reach the offeree before or at the time when a written offer is made. See 17 C.F.R. § 230.257 (Supp. 1959), which states that the offering circular requirement does not apply where the aggregate offering price does not exceed $50,000 and other conditions are fulfilled. See also 17 C.F.R. §§ 230.256 (e),(f), 230.257, 230.258, 230.260 (Supp. 1959), stating the requirements as to revised offering circulars and the use of advertising material.

[12] 68 Stat. 684 (1954), 15 U.S.C. § 77d(1) (1958).

[13] SEC Securities Act Release No. 2029, Aug. 8, 1939. This release may be found in 11 Fed. Reg. 10963 (1946).

[14] LOSS, SECURITIES REGULATION 399 (1951).

[15] SEC Securities Act Release No. 2029, *supra* note 13.

The determination of what constitutes a private offering has caused the Commission and the courts considerable difficulty. The solution of a specific problem in this area involves the application of what might be termed the "number test" and the "knowledge test." The statute specifically exempts transactions not involving a *public offering*.[16] In applying the "number test" the issuer must look to the number of persons to whom the issue is offered and not to the number of actual purchasers.[17] In discussing the problem of who is considered to be an offeree, the legal advisor to the Commission has commented:

> Any attempt to dispose of a security should be regarded as an offer. I have very serious doubt as to whether in many of the cases where it is stated that an offering is to be made only to an insubstantial number of persons, there may not be preliminary conversations for the purpose of ascertaining which of various possible purchasers would be willing to accept an offer of the security in question if it were made to them. Any such preliminary negotiations or conversations with a substantial number of prospective purchasers would in my opinion cause the offering in question to be a public offering, thereby necessitating prior registration of the security in question.[18]

The class of persons known as offerees for the purpose of this section of the Act cannot always be determined by counting the number of immediate offerees. Otherwise an offering to a few underwriters might be termed a private offering although the underwriters resold to thousands of individual investors. Where the issuer's immediate purchaser is taking for the purpose of resale, the number of *ultimate* offerees is the controlling factor.[19] Thus where the final phase in the distribution of the securities involves the offering of the issue to such a large number of persons that it must be considered a public offering, the exemption is not available.

To afford themselves some protection, issuers will often require their purchasers to submit an investment letter reciting that the securities were bought for investment and without any intent to redistribute them. However, submission of such a memorandum [20] does not preclude the Commission from producing evidence that the issuer knew that its purchaser would resell the securities to the public.[21]

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[16] 68 Stat. 684 (1954), 15 U.S.C. 77d(1) (1958).

[17] SEC Securities Act Release No. 285, January 24, 1935. This release can be found in 11 Fed. Reg. 10952 (1946). See THOMAS, FEDERAL SECURITIES ACT HANDBOOK 32 (1959).

[18] SEC Securities Act Release No. 285, Jan. 24, 1935. This release can be found in 11 Fed. Reg. 10952 (1946).

[19] LOSS, SECURITIES REGULATION 397 (1951). See also THOMAS, FEDERAL SECURITIES ACT HANDBOOK 32 (1959).

[20] SEC Securities Act Release No. 603, Dec. 16, 1935. This release can be found in 11 Fed. Reg. 10955 (1946).

The "knowledge test" was applied in *SEC v. Ralston Purina Co.*,[22] wherein the court stated that the applicability of this exemption "should turn on whether the particular class of persons affected needs the protection of the Act. An offering to those who are able to fend for themselves is a transaction 'not involving any public offering.' "[23] The offerees' need for the kind of information that registration would disclose and the availability of such information to them are the determining factors in satisfying the "knowledge test."[24]

Having considered the nature of the "knowledge test" and the "number test," their relationship to each other must be reviewed in order to determine the availability of the private-offering exemption. Early in its administration of the Securities Act, the Commission adopted a "rule of thumb" that an offering to less than twenty-five persons was a private offering.[25] A recent decision, *Gilligan, Will & Co. v. SEC*,[26] seems to indicate, however, that the courts will look to the ability of the offerees to "fend for themselves" although their number may be small. In this case the parties stipulated that there were four ultimate offerees and purchasers and that none of them were possessed of information of the scope and character contemplated by the Act. Therefore the "knowledge test" as propounded by the *Ralston Purina* case was not satisfied. However, petitioner argued that this test was not exclusive and should not be applied where the number of ultimate purchasers and offerees was only four. The court stated that the *Ralston Purina* case had clearly rejected a quantity limit and had adopted instead the test of looking at the knowledge possessed by the offerees.[27]

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[21] SEC v. Mono-Kearsarge Consol. Mining Co., 167 F. Supp. 248 (D. Utah 1958) decided that where the issuer has actual knowledge that the initial buyers are going to resell by means of a public offering, the exemption is not available. The court by dictum stated that the exemption is not allowable where the issuer sold securities under circumstances that would place it on notice that the buyers took with a view to re-distribution. Loss, Securities Regulation 398 (1951) states "where the *issuer* has good reason to believe that a purchaser's intention is to take for investment and the purchaser misrepresents and conceals his intention it would seem logical to conclude that the transaction does not involve a public offering so far as the issuer is concerned. . . ."

[22] 346 U.S. 119 (1953).

[23] *Id.* at 125.

[24] Thomas, Federal Securities Act Handbook 28 (1959). MacClain v. Bules, 275 F.2d 431 (8th Cir. 1960).

[25] SEC Securities Act Release No. 285, Jan. 24, 1935. This release may be found in 11 Fed. Reg. 10952 (1946); Thomas, Federal Securities Act Handbook 31 (1959); Loss, Securities Regulation 186 n. 321d (Supp. 1955) states that this rule or presumption is still controlling and that other factors become important only when the number of offerees is greater than twenty-five.

[26] 267 F.2d 461 (2d Cir. 1959). In the *Gilligan* case one Elliot agreed to sell convertible bonds of a corporation. Gilligan, Will & Co., the petitioner, purchased some of these bonds for itself and resold some to others. The Commission instituted proceedings to have determined whether the petitioner violated the act by selling unregistered securities. The Act exempts transactions by any person other than an issuer, underwriter or dealer. The Commission contended that the petitioner was an underwriter because it bought from an issuer with a view to distribution in the form of a public offering. The petitioner denied that the transactions constituted a public offering.

The court stated that even if a numerical exemption was available despite a violation of the *Ralston Purina* standard the petitioner could not qualify for it. Elliot had advised petitioner that after it took as much of the bonds as it wanted he (Elliot) was going to sell what remained to his friends. Even though petitioner's resales were to a number of persons small enough to qualify for a numerical exemption, it knew that the total number involved in the placement of the issue would not so qualify. The court also found another ground on which it could place its decision. Ten months after petitioner purchased the bonds it converted those it had not resold and sold the newly acquired stock on an exchange. The court found that petitioner's intention to retain the bonds it purchased for its own account only so long as the issuer continued to operate profitably was equivalent to having purchased with a view to public distribution. Therefore petitioner was an underwriter and was not entitled to an exemption.

A reasonable conclusion from the *Gilligan* case would seem to be that an issuer may obtain the private offering exemption if those to whom the issue is ultimately offered possess sufficient knowledge so as not to require the protection of the registration provisions of the Act. The number of ultimate offerees or their relation to the issuer is apparently important only insofar as it creates an inference as to the existence or absence of the required knowledge.[28]

INTRASTATE OFFERINGS

The Securities Act exempts from its registration requirements securities that are part of an issue offered and sold only to persons who reside within a single state. The exemption is available without monetary limit and irrespective of the number or knowledge of the offerees. If the issuer is a person, he must be a resident of such state to qualify. If a corporation is the issuer, it must have been incorporated by and must be doing business within such state. The corporate issuer's business need not be confined to the state in question nor does it have to transact the main portion of its business within that state. However, the corporation must be doing some business there other than the selling of the securities.[29]

The concept of "issue," as discussed in connection with the other exemptions, applies to this exemption in the same manner.[30] As to stock that is part of an original authorization, there exists a presumption of fact that all sales within one year from the commencement of the offering are part of the same issue. This can be rebutted by showing that distribution of an entire issue was completed prior to the end of the year and that subsequent sales within the year under the same authorization constituted a separate issue.[31]

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[27] *Id.* at 467. See also SEC v. Los Angeles Trust Deed & Mortgage Exch., 186 F. Supp. 830 (S.D. Cal. 1960).

[28] As to the importance of the relation between the offerees and the issuer, see SEC Securities Act Release No. 285, Jan. 24, 1935. This release may be found in 11 Fed. Reg. 10952. The courts have found that key employees, SEC v. Ralston Purina Co., 346 U.S. 119 (1953), and stockholders, SEC v. Sunbeam Gold Mines, 95 F.2d 699 (9th Cir. 1938); SEC v. Searchlight Consol. Mining & Milling Co., 112 F. Supp. 726 (D. Nev. 1953), did not possess the required knowledge merely because of their relation to the issuer.

[29] 48 Stat. 906 (1934), 15 U.S.C. § 77c(a)(11) (1958); LOSS, SECURITIES REGULATION 379 n.252 (1951, Supp. 1955). Loss indicates that if a single enterprise were to split up and incorporate in several states so that each separate entity could gain this exemption, the courts might pierce the corporate veil and deny such exemption. Loss, *supra* at 375, n.247.

[30] See SEC Securities Act Release No. 1459, May 29, 1937. This release can be found in 11 Fed. Reg. 10958 (1946). See also LOSS, SECURITIES REGULATION 375 (1951); THOMAS, FEDERAL SECURITIES ACT HANDBOOK 24 (1959).

A single sale to a non-resident or an offer to such a person will destroy this exemption.[32] Where initial purchasers residing within the state take from the issuer for the purpose of reselling the securities outside that state, the exemption is lost if such purchasers make an offer to a non-resident. Concerning this problem the legal advisor to the Commission has said:

> The Commission pointed out that in order that the exemption of section 3(a)(11) may be available for securities of any issue, it is clearly required that the securities at the time of completion of ultimate distribution shall be found only in the hands of investors resident within the State. Ultimate distribution, in the opinion of the Commission was declared to consist not only in the delivery of the bonds from the issuer to the underwriters, and the delivery of the bonds from the underwriters to sub-underwriters and to dealers, but also in the disposition of the bonds in the hands of investors in any secondary distribution which might take place pursuant to arrangements by the issuer or underwriters. An early listing of the bonds by the issuer on an exchange . . . might contemplate further distribution of the bonds prior to the completion of their ultimate distribution.[33]

The Commission is still faced with a problem. The 1959 annual report of the Commission stated that a device, difficult to detect, which is used to evade the registration requirements of the Act is to designate a resident of the proper state as a nominee for non-resident beneficial owners of the securities.[34] In other circumstances the alleged sales have been found merely to be a step in a planned interstate distribution of the issue. This exemption is not destroyed in every case where a purchaser resells to an out-of-state subpurchaser. The legal advisor to the Commission has stated: "[S]ecurities which have actually come to rest in the hands of resident investors—persons purchasing for investment and not with a view to further distribution or for purposes of resale—may be resold by such persons, whether directly or through dealers or brokers, to non-residents without in anyway affecting the exemption of the issue." [35] Where this exemption is claimed and subsequently sales are made to non-residents, the Commission can obtain an injunction restraining further use of the means of interstate commerce in disposing of the issue.[36] This remedy is available even though the issuer agrees to distribute the unsold portion of the issue only to residents of the proper state.[37] In addition, if the issuer authorizes a new issue to be exchanged for the securities previously held by resident purchasers, the distribution of these securities will be enjoined if in fact they are only a substitute for the previous issue and a portion of the previous issue was sold to non-resident purchasers.[38] This substitution of securities would be considered merely a continuation of the sale of the original issue and consequently a violation of the Act in the absence of registration.[39]

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[31] Brooklyn Manhattan Transit Corp., 1 S.E.C. 147 (1935); Loss, Securities Regulation 376 (1951). See also Shaw v. United States, 131 F.2d 476 (9th Cir. 1942).

[32] Peterson Engine Co. Inc., 2 S.E.C. 893 (1937); 25 SEC Ann. Rep. 5 (1959); Loss, Securities Regulation 375 (1951, Supp. 1955).

[33] SEC Securities Act Release No. 201, June 20, 1934. This release may be found in 11 Fed. Reg. 10952 (1946). See also Brooklyn Manhattan Transit Corp., 1 S.E.C. 147 (1935); SEC Securities Act Release No. 1459, May 29, 1937. This release may be found in 11 Fed. Reg. 10958 (1946). See also Stadia Oil & Uranium Co. v. Wheelis, 251 F.2d 269 (10th Cir. 1957).

[34] 25 SEC Ann. Rep. 5 (1959).

[35] SEC Securities Act Release No. 1459, May 29, 1937. This release may be found in 11 Fed. Reg. 10958 (1946). See also SEC v. Truckee Showboat Inc., 157 F. Supp. 824 (S.D. Cal. 1957), where no reason was given for denying the exemption. The issuer offered, in a California newspaper, to sell securities exclusively to bona fide residents of that state. The proceeds were to be used to acquire and operate a hotel in Nevada. The newspaper was sold outside California and copies were mailed to out-of-state subscribers.

It should be observed that another method of avoiding registration is to confine the offering to intrastate channels. This should not be confused with the intrastate exemption. In the former the Securities Act does not apply because the means of interstate commerce are not used. In the latter the Act does apply, but it grants an exemption even though those means are used.

Conclusion

Although each of the exemptions discussed above permits the issuer to dispense with the registration requirements of the Securities Act, their usefulness is restricted. The disclosure provisions and reports that must be filed, although they are not so burdensome or expensive as registration, reduce the desirability of the small issue exemption. The private-offering exemption has been severely restricted by decisions that tend to make it available only where the offerees are able to "fend for themselves" despite the smallness of their number. The availability of the intrastate exemption is limited because of the nature of the securities distribution process. As the size of the issue increases, the probability of finding initial offerees, all of whom reside within the proper state, and the probability that they will take without an intent to resell to non-residents, become more remote. However, if the offering price is $300,000 or less, the small-issue exemption is available. If it exceeds that amount, it may be impossible to market the securities through normal distribution channels without incurring non-resident sales.

EVARISTE G. LAVIGNE, JR.

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[36] Hillsborough Inv. Corp. v. SEC, 276 F.2d 665 (1st Cir. 1960).

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*

SUMMARY JUDGMENT FOR PLAINTIFFS IN NEGLIGENCE ACTIONS IN NEW YORK

INTRODUCTION

Under the summary judgment rules that have been in effect in New York since March, 1959, any party may move for summary judgment in any type of action.[1] The basic requirement for the granting of such a motion is that there be no material or triable issue of fact presented.[2] Since the advent of this new rule, numerous plaintiffs have been granted summary judgment in negligence actions, particularly those involving automobile accidents. In many cases that have arisen in the first and second departments, where the motion was granted by the trial court, the appellate division has reversed the order on appeal and denied plaintiff's motion, stating tersely, "The record presents issues of fact which should be resolved after trial," without specifying what issues of fact existed.[3] Other opinions, however, have indicated the issues to be resolved. In still other cases, the granting of the order has been affirmed, and in some cases where the motion was denied, the order has been reversed. As yet, the court of appeals has not spoken on this matter.

In most of the cases there are two questions presented: (1) whether there is a triable issue as to the facts of the event, and (2) whether the undisputed conduct constitutes negligence as a matter of law. The object of this comment is to summarize the procedural requirements of rule 113, to evaluate the cases with particular regard to the two questions mentioned above, and to indicate various types of negligence cases in which summary judgment has been granted.

DEVELOPMENT OF SUMMARY JUDGMENT IN NEW YORK

Summary judgment was introduced in New York in 1921; however, the initial measure was extremely narrow in scope. The device was available only to the plaintiff and was limited to actions for the recovery of a debt, on a judgment for a stated sum, or for a liquidated demand arising on a contract.[4] Subsequent amendments [5] liberalized the rule, so that prior to the 1959 revision, the rule allowed a plaintiff to move for summary judgment in nine enumerated classes of action, while the defendant could make the motion in any type of action where a sufficient prima facie defense was established upon documentary evidence or official records.[6] Although a hearing on a motion for summary judgment is not a trial but merely a proceeding to determine if there are triable issues of fact, the motion when granted is the procedural equivalent of a trial and is a final disposition of the case on the merits.[7] The constitutionality of rule 113 was upheld in *General Inv. Co. v. Interborough Rapid Transit Co.*,[8] where the court said:

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[1] N.Y. R. CIV. PRAC. 113.

[2] As to matrimonial actions, see N.Y. R. CIV. PRAC. 113(4).

[3] The writer noted 34 memorandum opinions rendered in this manner by the appellate divisions since the enactment of new rule 113.

[4] N.Y. R. CIV. PRAC. 113 (1921). See PASTON, SUMMARY JUDGMENT IN NEW YORK 33 (1958).

[5] The subsequent amendments were enacted in the years 1932, 1933, 1944, and 1953. See PASTON, *op. cit. supra* note 4, at 37.

[6] N.Y. R. CIV. PRAC. 113 (1952). See PASTON, *op. cit. supra* note 4, at 45; 5 CARMODY WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 121–22 (1953).

> The argument that rule 113 infringes upon the right of trial by jury guaranteed by the Constitution cannot be sustained. The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a bona fide issue exists between the parties to the action.[9]

Summary judgment proved to be a most beneficial device in New York in alleviating crowded court calendars and in relieving parties of lengthy trials of frivolous and feigned claims, counterclaims and defenses.[10] These recognized benefits resulted in recommendations that summary judgment be made available to all parties in all causes of action.[11] Such suggestions were finally adopted in the 1959 amendment of the rule.[12]

THE FEDERAL APPROACH

The changes in rule 113 brought the field of operation of the New York procedure for summary judgment into closer conformity with that of rule

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[7] Falk v. Goodman, 7 N.Y.2d 87, 91, 163 N.E.2d 871, 873, 195 N.Y.S.2d 645, 647 (1959). *But see* Frutos v. Shapiro, 11 App. Div. 2d 1005, 206 N.Y.S.2d 18 (1960), where it was held that only in an extraordinary case will the defendant be allowed a further opportunity to defend. The motion to vacate was granted in the *Frutos* case because of the possible presence of a substantial issue of contributory negligence and the defendant's lack of familiarity with the facts of the accident, which were not fully developed in the affidavits.

[8] 235 N.Y. 133, 139 N.E. 216 (1923).

[9] *Id.* at 142–43, 139 N.E. at 220.

[10] Clark & Samenow, *The Summary Judgment,* 38 YALE L.J. 423, 455–56 (1929); McCall, *Summary Judgment Under New York Rules,* 10 A.B.A.J. 22 (1924). See also Sheintag & Cohen, *Summary Judgments in the Supreme Court of New York,* 32 COLUM. L. REV. 825 (1932), which concludes, on the basis of a statistical study, that summary judgment had accomplished its avowed object of reducing the delays of litigation and that it had not given rise to once feared abuses of arbitrarily excluding reasonable defenses or improperly anticipating the defendant's line of proof.

[11] The recommendation was made as early as 1934. Commission on the Administration of Justice, N.Y. Leg. Doc. No. 50 (1934), at 287–88.

[12] N.Y. R. CIV. PRAC. 113 provides:

> When an answer is served in an action,
> 1. In any action, after issue has been joined, any party may move for summary judgment. . . .
> 2. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions, written admissions, &c. The affidavit must be by a person having knowledge of the facts; it must recite all the material facts; and it must show that there is no defense to the action or claim or that the action or claim has no merit, as the case may be. The motion shall be granted if, upon all the papers and proof submitted, the action or claim or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment, interlocutory or final, in favor of any party. The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact other than an issue as to the amount or the extent of the damages. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross motion.

56 of the Federal Rules of Civil Procedure.[13] The federal rule permits any party to move for summary judgment upon a claim, counterclaim or cross-claim in any action, including one against the United States or an officer or agency thereof, upon the pleadings, depositions and admissions on file, with or without supporting affidavits.[14]

Although the scope of the two rules is now practically identical, some differences remain. In New York, the motion may be made only after joinder of issue, and a motion made prior to joinder is premature.[15] In the federal court, a claimant may move at any time after the expiration of twenty days from the commencement of the action or after service of a motion for summary judgment by the adverse party.[16] A defending party may make the motion at any time.[17] Affidavits are not required in the federal courts,[18] and an order denying summary judgment, being interlocutory, is usually not appealable.[19]

While summary judgment is available in any type of action under the federal rules, the federal courts have been conservative in awarding summary judgment in negligence cases, holding that issues of negligence are generally not susceptible of determination by summary judgment since they involve the standard of the reasonable man.[20] Where the motion is made by the plaintiff, it is almost invariably denied for this reason.[21] However, the procedure is appropriate in some few instances. Where the defendant is asserting an affirmative defense, such as res judicata, statute of limitations, or release, and this affirmative defense can be established with certainty, the motion has been granted.[22] Apparently, it is only in the exceptional negligence case that summary judgment will be granted in the federal courts.

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[13] *Compare* N.Y. R. Civ. Prac. 113, *with* Fed. R. Civ. P. 56. See Paston, *op. cit. supra* note 4, at 400–38 (1958).

[14] Fed. R. Civ. P. 56(b),(c).

[15] N.Y. R. Civ. Prac. 113.

[16] Fed. R. Civ. P. 56(a).

[17] Fed. R. Civ. P. 56(b).

[18] Fed. R. Civ. P. 56(b),(c).

[19] 28 U.S.C. § 1291; Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945). See also 28 U.S.C. § 1292 (Supp., 1960), particularly subsection (b).

[20] See, *e.g.*, Jacob v. Pennsylvania R.R., 203 F.2d 290 (6th Cir. 1953); Dulansky v. Iowa-Illinois Gas & Elec. Co., 191 F.2d 881 (8th Cir. 1951); Ramsouer v. Midland Valley R.R., 135 F.2d 101 (8th Cir. 1943). See generally 6 Moore, Federal Practice ¶ 56.17 at 2232 (2d ed. 1953). A study conducted in one federal district revealed that in 292 negligence cases pending in a particular year, only one motion for summary judgment was made and that motion was denied. Note, 36 Minn. L. Rev. 515, 519 (1952).

[21] See, *e.g.*, Roucher v. Traders & Gen. Ins. Co., 235 F.2d 423 (5th Cir. 1956); 6 Moore, *op. cit. supra*, note 20 at 2232. *But see* American Airlines, Inc. v. Ulen, 186 F.2d 529 (D.C. Cir. 1949), where a motion for summary judgment was granted to a plaintiff who was injured when an airplane, upon which the plaintiff was a passenger, crashed into a mountain. It was conclusively shown that the flight plan had called for an altitude less than that required by government regulations and that flying at this low altitude was the proximate cause of the crash.

[22] Mabardy v. Railway Express Agency Inc., 26 F. Supp. 25 (D. Mass. 1939) (res judicata); McGrath v. Helena Rubinstein, Inc., 29 F. Supp. 822 (S.D. N.Y. 1939) (statute of limitations); Miller v. Hoffman, 1 F.R.D. 290 (D. N.J. 1940). See generally 6 Moore, Federal Practice ¶ 56.5, at 2231 (2d ed. 1953).

PROCEDURAL REQUIREMENTS IN NEW YORK

A plaintiff may move for summary judgment at any time after the answer is served.[23] The motion should be supported by a copy of the pleadings, by an affidavit made on the plaintiff's personal knowledge, by depositions, written admissions as contained in a motor vehicle accident report, admissions made on examination before trial, or other legal proof.[24] The defendant's answering affidavit should be made on the personal knowledge of the defendant and should set forth evidentiary facts, not mere conclusions or legal arguments.[25] The defendant is required to reveal and lay bare his proof in order to show that the matter set forth in his answer is real and is capable of being established at a trial.[26] Affidavits made by an attorney who has no personal knowledge of the facts are of no probative value,[27] and where a plaintiff has established a prima facie case on his moving papers, such an affidavit submitted by the defendant will have no force and effect and will be disregarded.[28] However, where the essential facts as to the plaintiff's contributory negligence are exclusively within the plaintiff's knowledge, summary judgment cannot be granted, despite the inability of the defendant to controvert facts in his moving affidavit.[29] Similarly, if facts upon which the motion is predicated are not clearly within the knowledge of the opposing party, summary judgment should not be granted.[30]

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[23] N.Y. R. CIV. PRAC. 113. The fact that a long time has elapsed between joinder of issue and the making of the motion is of no effect. Beaudry v. Royal Indem. Co., 201 Misc. 1, 112 N.Y.S.2d 507 (N.Y. City Court 1952).

[24] N.Y. R. CIV. PRAC. 113(2). See PASTON, SUMMARY JUDGMENT IN NEW YORK xxi–xxii (Supp. 1960).

[25] In Cacciato v. Leatherman, 23 Misc. 2d 550, 200 N.Y.S.2d 152 (Sup. Ct. 1960), plaintiff's motion was granted, when the defendant operator of a tractor trailer said on examination before trial that he was stopped at a traffic light, five or six feet behind the plaintiff's car, and while he was reaching over to pick up a sweater that had fallen on the floor, his foot slipped off the brake and the vehicle rolled into the car ahead. The defendant's affidavit in substance repeated the above and urged that he had done this before on many occasions and nothing had happened, and that he was neither careless or negligent.

[26] Di Sabato v. Soffes, 9 App. Div. 2d 297, 193 N.Y.S.2d 184 (1959), *appeal dismissed,* 11 App. Div. 2d 660, 205 N.Y.S.2d 831 (1960). A defendant is not precluded from showing in his affidavit a defense which was not pleaded in his answer. Jackson v. Jackson, 24 Misc. 2d 1028, 205 N.Y.S.2d 286 (Sup. Ct. 1960).

[27] Cohen v. Pannia, 7 App. Div. 2d 886, 181 N.Y.S.2d 220 (1959).

[28] *Ibid.*

[29] In Phelan v. Houghton, 16 Misc. 2d 227, 184 N.Y.S.2d 489 (Sup. Ct.), *rev'd mem.,* 9 App. Div. 2d 767, 192 N.Y.S.2d 231 (1959), the defendant, while driving 45 miles per hour in a 30 mile zone over a familiar road at 3:00 A.M. in the rain, skidded going around a curve and crashed into a tree. The plaintiff passenger was asleep in the back seat. Against this undisputed evidence, the defendant submitted only an argumentative attorney's affidavit which set forth statements of law rather than evidentiary facts, urging it was a question of fact whether the passenger should have fallen asleep if defendant was operating the automobile in a reckless and dangerous manner under adverse conditions. The order granting plaintiff's motion was reversed.

[30] Hogan v. Ciancimino, 12 App. Div. 2d 501, 207 N.Y.S.2d 87 (1960). Absence of personal knowledge by the defendant administrator entitled him to defend upon a plenary trial of the issues.

EVALUATING AFFIDAVITS AS TO THE EXISTENCE OF FACTUAL DISPUTES

Rule 113 provides that the motion shall be denied if any party shows facts sufficient to require a trial of any issue of fact.[31] It has been said that the key to summary judgment is issue-finding, not issue-determination.[32] When there is a disparity between the plaintiff's and defendant's versions of the occurrence, summary judgment is plainly not available. If all the facts are admitted, summary judgment may be available if it can be said that the conduct is negligent as a matter of law.[33] A problem arises where the plaintiff can show in his moving papers that he has established a prima facie case, amply supported by proof, such as photographs, admissions made on examination before trial and in accident reports, and the defendant at the last minute interposes a highly improbable version in his affidavit that is contrary to his previous statements. May the court strike out and disregard such an affidavit as obviously false saying that no substantial issue is raised,[34] or does this raise an issue of fact to be decided by a jury? On a motion for summary judgment in other types of actions, there is an abundance of authority as to the power of the court to strike out as sham that which is obviously false.[35] However, such cases involved situations where the plaintiff had conclusive documentary proof to support his claim and the defendant simply denied any knowledge or information sufficient to form a belief, or submitted a clearly false affidavit.[36] In negligence cases, the plaintiff's supporting proof is usually in the form of admissions and photographs and is of less probative value than documentary proof. When a different version is suggested in the defendant's affidavit from the version he had suggested on a prior occasion, a question of credibility arises, and it is for the jury to determine credibility.[37]

While it has been urged that courts should evaluate affidavits for their obvious falsity in negligence cases,[38] they have apparently been unwilling to do so. In *Schwartz v. Polizzi,*[39] the defendant's automobile struck the plaintiff's automobile in the rear. In his examination before trial, the defendant said that traffic was starting and stopping, and that he started and could not stop quickly enough and went into the rear of the car ahead at a speed of about ten miles per hour. This statement was consistent with the plaintiff's version of the event. However, in his affidavit defendant claimed that the vehicle ahead stopped suddenly and without warning and that although he applied his brakes immediately, he could not stop. The court refused to grant the motion for summary judgment because the affidavit of the defendant could be believed by a jury rather than his examination before trial.[40] The judge made the observation, however, that if rule 113 is to be an aid in relieving calendar congestion of tort actions the court must have the right to ignore contradictory affidavits interposed at the last minute.[41]

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[31] N.Y. R. CIV. PRAC. 113(2).

[32] Falk v. Goodman, 7 N.Y.2d 87, 91, 163 N.E.2d 871, 873, 195 N.Y.S.2d 645, 647 (1959).

[33] Di Sabato v. Soffes, 9 App. Div. 2d 297, 193 N.Y.S.2d 184 (1959), *appeal dismissed,* 11 App. Div. 2d 660, 205 N.Y.S.2d 831 (1960).

[34] N.Y. R. CIV. PRAC. 113(2) provides that the motion shall be denied if any party shall show facts *sufficient* to require a trial. (Emphasis added.)

[35] *E.g.,* McDonald v. Amsterdam Bldg. Co., 232 App. Div. 382, 251 N.Y.S. 494 (1931), *aff'd,* 259 N.Y. 533, 182 N.E. 169 (1932); General Inv. Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 139 N.E. 216 (1923).

[36] In General Inv. Co. v. Interborough Rapid Transit Co., *supra* note 35, plaintiff produced negotiable notes and affidavits showing plaintiff to be the owner and holder of defendant's notes and the defendant denied knowledge sufficient to form a belief.

[37] Di Donna v. Sachs, 9 App. Div. 2d 576, 189 N.Y.S.2d 514 (1959); Sullivan v. Kowalinski, 22 Misc. 2d 687, 204 N.Y.S.2d 415 (Sup. Ct. 1960).

[38] PASTON, SUMMARY JUDGMENT IN NEW YORK xviii (Supp. 1960).

[39] 201 N.Y.S.2d 160 (Sup. Ct. 1960).

In *Sanzo v. Toklas*,[42] the appellate division reversed an order granting summary judgment for the plaintiff in a case involving an intersection accident between plaintiff's westbound automobile and defendant's northbound automobile. Traffic on the northbound street was one way and was required to stop before entering the intersection. The photographs submitted clearly indicated that the defendant's car hit the middle of the right side of the plaintiff's car. The defendant admittedly ignored the "stop" sign, saying he slowed to about ten miles per hour, but contended that plaintiff's vehicle was proceeding at a very fast speed directly in the path of his vehicle. The majority held that while the photographs and papers tended to support the plaintiffs' version of the accident and the defendant's version was not very convincing, the motion should not be granted as to either plaintiff operator or plaintiff passenger. Despite the fact that the court might well be justified in setting aside a verdict in favor of the defendant as contrary to the weight of the evidence, the court held that triable issues were presented which precluded finding the defendant liable as a matter of law.[43] The conflicting narratives of the occurrence and the photographs did not establish as a matter of law that any negligence of the defendant was the proximate cause of the accident.

Scott v. New York City Transit Authority[44] involved a similar situation. The appellate division reversed the order, two justices dissenting, and denied the plaintiff's motion for summary judgment. The defendant truck driver admittedly failed to heed "stop" signs at an intersection and as a result collided with a bus in which the plaintiff was a passenger. The defendant's claim that his view was obstructed by trees and cars was refuted by photographic exhibits. The two dissenting judges indicated this claim was beyond belief and that no triable issue of fact was raised.

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[40] The court applied the rule as laid down in Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 245, 54 N.E.2d 809, 811 (1944), that before a verdict may be directed, the court must take that view of the evidence most favorable to the non-moving party, and then if by no rational process could a jury base a finding in favor of the party moved against, it may direct a verdict.

[41] 201 N.Y.S.2d at 163.

[42] 10 App. Div. 2d 931, 200 N.Y.S.2d 738 (1960).

[43] One judge concurred as to the plaintiff operator because of the issue of his contributory negligence. He strongly urged that the granting of the motion should have been affirmed as to the plaintiff passenger, for any contributory negligence on the part of the driver would not be imputable to her, and the defendant's version of the accident was incredible and presented no triable issue as to his negligence as a matter of law.

[44] 10 App. Div. 2d 992, 203 N.Y.S.2d 162 (1960).

NEGLIGENT CONDUCT AS A MATTER OF LAW

Where the facts are established, the court may grant summary judgment for the plaintiff if upon all the papers and proof submitted in the action the court would be justified in directing judgment for the plaintiff as a matter of law.[45] The application of this rule inevitably leads to the question, when may the court say that a defendant's conduct constitutes negligence as a matter of law and when must the court leave this determination to the jury?

Negligence is a failure to exercise the degree of care that a reasonable man would exercise under similar circumstances.[46] Once the court has determined that a legal duty exists and made a declaration of the applicable general standard of conduct, it may decide whether the individual has conformed to the particular standard required only in cases in which the judgment of reasonable men could not differ upon the question.[47] In doing so, the court must take that view of the evidence most favorable to the non-moving party, and from the evidence and the inferences reasonably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the non-moving party. If by no rational process could a jury upon the evidence presented base a finding in favor of the party against whom the motion is made, a directed verdict is warranted.[48] However, even though a court might set aside a verdict in favor of the defendant as contrary to the weight of the evidence, it may not grant summary judgment for the plaintiff unless it would be required to set a verdict aside as a matter of law.[49]

Applying these rules to a negligence case in which the plaintiff has made a motion for summary judgment, it seems obvious that in the vast majority of cases the motion will be denied, because in most cases, reasonable minds will differ as to whether or not the conduct exhibited reasonable care under the circumstances. Nearly every factual situation will differ from others previously decided. Each particular case must be decided according to its own facts, and it then becomes the duty of the trier of the facts to determine the standard of conduct for those particular circumstances.[50] It is possible in some cases to say that the conduct complained of clearly does not conform to what the community requires.[51] However, even in those cases it may be necessary in the determination of a defendant's negligence to ascertain also whether or not this conduct was the proximate cause of the resulting injury. It may be questioned whether the untoward result could reasonably have been foreseen, whether there was an intervening cause, whether plaintiff was contributorily negligent, or whether other triable questions may be presented. If reasonable minds may differ as to these matters, the matter is for the jury's determination.

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[45] N.Y. R. CIV. PRAC. 113(2).

[46] McLean v. Triboro Coach Corp., 302 N.Y. 49, 96 N.E.2d 83 (1950). See generally PROSSER, TORTS 124 (2d ed. 1953).

[47] McDonald v. Metropolitan St. Ry., 167 N.Y. 66, 60 N.E. 282 (1901); see PROSSER, *op. cit. supra* note 46, at 191–193.

[48] Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 245, 54 N.E.2d 809, 811 (1944).

[49] Sanzo v. Toklas, 10 App. Div. 2d 931, 200 N.Y.S.2d 738 (1960).

[50] Sadowski v. Long Island R.R., 292 N.Y. 448, 55 N.E.2d 497 (1944); see PROSSER, *op. cit. supra* note 46, at 124.

[51] See *e.g.*, Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920), where the violation of a statute, designed for the protection of the person injured, was the proximate cause of the injury; Fagan v. Atlantic Coastline R.R., 220 N.Y. 301, 115 N.E. 704 (1917), where intoxication was the proximate cause of the injury; Wood v. Woodlawn Improvement Ass'n Transp. Corp., 215 App. Div. 628, 214 N.Y.S. 398 (1926), where a pedestrian walked into the side of a passing automobile.

With the advent of the new summary judgment rules, the courts have been and will continue to be called upon to determine whether or not on the undisputed facts, the defendant's conduct can be deemed negligent as a matter of law. *Di Sabato v. Soffes* was such a case.[52] The defendant driver stopped his car, which was equipped with automatic transmission and push-button control, left the motor running in neutral, and, after applying the emergency brake, went to the right side of the car to let his passenger out. When the door would not open, the defendant directed his passenger to slide across the seat and alight from the driver's side. In attempting to leave the car the passenger reached for the dashboard for leverage and while doing so accidentally shifted the car into "drive." As a result, the car careened across the street and crashed into a drugstore, severely injuring the plaintiffs. Although the plaintiffs moved for summary judgment on these facts which were brought out on examination before trial, the defendant failed to submit any affidavits or proof establishing a defense. The appellate division reversed an order denying summary judgment for the plaintiff and held that it should be granted.[53] The majority held that the defendant's negligence stemmed from not turning off the ignition. The defendant added to this original negligent act by instructing his passenger to leave the car by sliding across the seat and getting out on the driver's side while the motor of the car was running. The court concluded that a reasonably prudent person would foresee the dangerous consequences that would result from one act of omission following another.[54] In the opinion of the dissenting judge, the questions as to whether the driver was bound to foresee what his passenger would do and whether the driver as a careful operator should have permitted his passenger to leave the car in this manner were for the jury's determination. He further pointed out: "[T]he drawing of reasonable inferences is exclusively the province of the fact finders. It is only inferences which *must* be drawn from evidentiary facts that are the stuff of what is referred to as 'matter of law.' "[55]

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[52] 9 App. Div. 2d 297, 193 N.Y.S.2d 184 (1959), *appeal dismissed,* 11 App. Div. 2d 660, 205 N.Y.S.2d 831 (1960).

[53] There was no dispute about what happened except as to whether or not the defendant had set the emergency brake. Although the defendant submitted no personal affidavit, on his examination before trial, he stated that he had set the emergency brake. The court said that irrespective of whether the defendant failed to set the brake or whether the passenger released it in getting out, in the absence of proof that the brakes were defective, the defendant was not relieved of liability. *Id.* at 302, 193 N.Y.S.2d at 189.

[54] The court cited Condran v. Park & Tilford, 213 N.Y. 341, 107 N.E. 565 (1915), which held that it was not necessary that the defendant have notice of the particular manner in which an accident occurs, and Matter of Guardian Cas. Co., 253 App. Div. 360, 2 N.Y.S.2d 232 (1938), which held that where the acts of a defendant gave rise to a series of events culminating in injury to another, such acts are all to be treated as the proximate cause.

[55] Di Sabato v. Soffes, 9 App. Div. 2d 297, 307, 193 N.Y.S.2d 184, 196 (1959).

In *Gerard v. Inglese*,[56] the appellate division affirmed an order granting the plaintiff passengers' motion for summary judgment against the defendant operator. While traveling at a speed of forty to forty-five miles per hour on a parkway, the defendant attempted to light a cigarette with the cigarette lighter of the automobile. In doing so she took her eyes off the road; the car struck a curb and continued on for about seventy-five feet, partly on the highway and partly on the grass, throwing the passengers from the car. The defendant, who had admitted these facts at the examination before trial, made no further effort to explain her failure to control her automobile but contended that the question whether the accident was caused by negligence on her part could only be determined by a jury. The court, while commenting that proof of the sudden swerving of an automobile from the highway is not prima facie proof of negligence,[57] held that in view of the admitted facts, the inference that the car left the road and that the accident occurred because of the defendant's negligence was inescapable.

SUMMARY JUDGMENT AS APPLIED TO VARIOUS TYPES OF CASES

Summary judgment may be particularly well suited to situations in which an inference or presumption of negligence arises against the defendant, as well as in those situations where the conduct is admitted and can be said to be negligent as a matter of law. In some of these cases, the inference may appear to be inescapable, and where the defendant fails to set forth any evidentiary facts in his affidavit as to the circumstances surrounding the event, he may fail to raise any triable issue of fact.

Res Ipsa Loquitur.—To invoke the doctrine of res ipsa loquitur, it must be shown that the person sought to be charged with negligence had exclusive control of the agency producing the injury and that the accident would not have happened if reasonable care were exercised.[58] When the doctrine of res ipsa loquitur is applied, the circumstances speak for themselves. In cases to which the doctrine applies, the drawing of any inference of negligence is usually left to the jury, since all the surrounding circumstances as well as the happening of the event itself must be taken into consideration.[59] The inference of negligence is permissive, not mandatory. There may be cases, however, where the prima facie proof is so convincing that the inference of negligence arising therefrom is inescapable.[60]

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[56] 11 App. Div. 2d 381, 206 N.Y.S.2d 879 (1960).

[57] The court cited Galbraith v. Busch, 267 N.Y. 230, 196 N.E. 36 (1935).

[58] Bressler v. New York Rapid Transit Corp., 270 N.Y. 409, 1 N.E.2d 828 (1936).

[59] In Foltis, Inc. v. City of New York, 287 N.Y. 108, 38 N.E.2d 455 (1941), the defendant's water pipe which had been in the ground for nine years burst and as a result the plaintiff's cellar was flooded. The plaintiff introduced no evidence. The court said it could not direct a verdict for the plaintiff since it was up to a jury to determine whether any inference of negligence could be drawn. In the *Foltis* case, upon evidence of the careful construction of the water main, a jury might well infer that the break was not caused by the negligence of the defendant.

[60] Richard Equip. Corp. v. Manhattan Indus. Contracting Co., 9 App. Div. 2d 691, 191 N.Y.S.2d 587 (1959); Foltis, Inc. v. City of New York, *supra* note 59, at 121, 38 N.E.2d at 462 (dictum).

Richard Equip. Corp. v. Manhattan Indus. Contracting Co.,[61] involved a situation from which the inference of negligence was held to be inescapable. A heavy press brake fell from the defendant's truck upon another machine owned by the plaintiff while the defendants were in the process of moving it to another location. The facts were undisputed and the defendant made no attempt in his opposing affidavit to show facts that would militate against drawing the inference of negligence. In reversing an order that had denied plaintiff's motion for summary judgment, the appellate division said that the doctrine of res ipsa loquitur was applicable, and that only one inference could be drawn since the defendants, who were professional movers, were in exclusive control and dropped the machine in the process of moving it.

In most cases involving res ipsa loquitur, the inference of negligence is not inescapable and the drawing of any inferences must be left to a jury. Therefore, a motion for summary judgment will be denied. Thus, in one case, the motion was denied where plaintiffs, passengers on a train, were injured when the train was derailed.[62] The motion has been denied to a plaintiff who was struck on the head by part of a falling sign on the ground that causes other than the defendant-owner's negligence may have caused the accident.[63]

Passengers in Automobiles.—Summary judgment seems particularly appropriate in an action brought by passengers where a defendant's conduct is negligent as a matter of law, for the issue of contributory negligence is often not in issue.[64] For example, in *Kass v. Silverstein,*[65] the court granted the plaintiff passengers' motion. The defendant admittedly failed to slow down when he saw a boy, a half a block away, on a bicycle that was out of control. When the driver abruptly stopped the car the passengers were injured. In a similar case,[66] the motion was granted where a defendant offered no explanation as to why he did not see a child until the child was only 15 feet away, or as to why he panicked and put his foot on the gas pedal causing the car to run into a light pole. In *Thum v. Zraick,*[67] where an action was brought by the passengers of a taxicab against the owners of the taxicab and another motorist for injuries received in an intersection accident, summary judgment was granted against the motorist who admitted that she failed to stop at a "stop" sign and proceeded without being reasonably certain that she could do so safely.

Pedestrians.—In *O'Brien v. Purpura,*[68] two pedestrians were injured by a car that traveled diagonally across a large intersection, mounted the sidewalk, careened off a building and finally struck the plaintiffs. The defendant's only explanation of the accident was that as he was approaching the intersection at a reasonable rate of speed, the light turned red, and as he quickly applied his brakes, his car suddenly swerved to the left and mounted the curb. In granting the motion, the court said the defendant had failed in his proof to rebut the presumption that arises when a pedestrian is struck by an automobile that mounts the sidewalk, *i.e.*, that the motorist was negligent and the pedestrian was free from contributory negligence.

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[61] See note 60 *supra.*

[62] Nixon v. New York Cent. R.R., 10 App. Div. 2d 870, 199 N.Y.S.2d 721 (1959).

[63] Lattanzio v. Liss, 23 Misc. 2d 307, 201 N.Y.S.2d 513 (Sup. Ct. 1960).

[64] The operator's contributory negligence is not imputable to a passenger in an action against another motorist. Sanzo v. Toklas, 10 App. Div. 2d 931, 200 N.Y.S.2d 738 (1960).

[65] 21 Misc. 2d 99, 195 N.Y.S.2d 701 (Sup. Ct. 1959).

[66] Pergola v. Nicastro, 21 Misc. 2d 98, 195 N.Y.S.2d 740 (Sup. Ct. 1959).

[67] 204 N.Y.S.2d 298 (Sup. Ct. 1960).

[68] 205 N.Y.S.2d 3 (Sup. Ct. 1960).

Driver Falling Asleep.—In cases involving accidents caused by the motor vehicle operator's falling asleep, an issue of fact normally exists as to whether the driver had any warning that he might fall asleep.[69] However, in *Stanley v. Burnside*[70] the plaintiff's motion was granted against the defendant whose car went off the road at 3:25 A.M. and struck both a parked car and a pedestrian. At a motor vehicle bureau hearing, the defendant admitted having been awake since 6:30 A.M. and that he had fallen asleep while driving. His affidavit stated that he fell asleep at the wheel without any prior indication or knowledge of drowsiness. The court, in granting the motion, said that permitting oneself to fall asleep creates an inference of negligence, for sleep does not come on without warning. The inference may be rebutted by proof of the circumstances under which the driver was operating the vehicle, but the defendant had failed to come forward with facts to refute the inference of negligence.[71]

CONCLUSION

While summary judgment has been granted quite frequently in negligence actions in New York, the extent of its application is largely unsettled and will no doubt remain so until the court of appeals speaks on the matter. The procedure is beneficial in clearing congested court calendars and in helping litigants receive a prompt determination of their case; therefore, its more frequent use seems justified in appropriate cases. Where, on undisputed facts, an inference of negligence is raised against a defendant who offers no other explanation to suggest that any other reasonable inference might be drawn, it would seem that summary judgment is warranted. Similarly, where a defendant interposes an affidavit that is contradicted by photographs, admissions and other proof that clearly indicates the falsity of the statement, the courts should be willing to say that no bona fide issue exists and to grant a motion for summary judgment. The fear of depriving a party of his day in court should not lead the courts to permit him to evade the consequences of the event by merely making statements in an affidavit.

RICHARD M. LEONARD

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[69] Vignola v. Britts, 11 App. Div. 2d 801, 205 N.Y.S.2d 215 (1960).

[70] 20 Misc. 2d 932, 192 N.Y.S.2d 452 (Sup. Ct.), *aff'd*, 10 App. Div. 2d 652, 199 N.Y.S. 2d 408 (1959).

[71] The exhaustive opinion in the *Stanley* case quoted from Kaufman & Kantrowitz, *The Case of the Sleeping Motorist*, 25 N.Y.U.L. REV. 362 (1950).

THE REGISTRATION OF TRADE SLOGANS UNDER THE LANHAM ACT

THE NATURE OF A TRADE SLOGAN

A slogan can be any combination of words, but for our purposes it can be more narrowly defined as a short phrase intended to advertise a product. Defined in this way it can be more readily distinguished from an ordinary trademark in that (1) an ordinary trademark is not a phrase but only a word or two denoting either the real or trade name of a manufacturer or of a product offered for sale, and (2) a trademark is intended primarily not to advertise the goods to which it is affixed, although it may also be used for that purpose, but to distinguish the source of the goods offered for sale, though that source may be unknown to the purchaser.[1]

There are almost as many slogans in use as there are products for sale.[2] A slogan affixed to the goods for sale that is imaginative in its wording or designed to attract the eye and that has been used by a particular manufacturer extensively and for a long time may in fact function as a trademark. However, the slogan is seldom, if ever, the only mark used on a product. On the other hand, a slogan may not be affixed to the goods or even displayed with the goods offered for sale. Instead it may be used only as a mere advertising device to promote the sale of goods by means of television, radio and other means of commercial media. Moreover, a slogan may be affixed to goods and may have been used for a long time but still be trite and banal, such as THE BEST THERE IS or OUT OF THIS WORLD. In every case, however, the slogan is intended primarily to advertise and promote the sale of the goods rather than merely to distinguish them. A merchant may create an unusual trademark or one with a peculiarly appealing design for the purpose of enticing the public into choosing his wares. But his main purpose in using a trademark is to distinguish his goods from others on the market. The fact that the purpose of a slogan is generally different from the purpose that a trademark serves does not necessarily mean that a slogan is of any less value to a merchant as a commercial device. The value of a slogan is attested to by the amount of time and energy that is today being expended for commercial advertising. The protection given by common law and statute to trade slogans has been meagre compared to the protection given to trademarks. The discussion that follows is intended to point out the need that exists today to protect the users of trade slogans.

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[1] The definition of a trademark does not exclude those that do not identify the source of the goods, but distinguishment of the source, though it may be unknown, is generally necessary when protection of the mark is sought. See, *e.g.*, Elgin Am. Mfg. Co. v. Elizabeth Arden, Inc., 83 F.2d 687 (C.C.P.A. 1936).

[2] For an interesting commentary on the effect of slogans on the American scene, see Lunsford, *The Protection of Trade Slogans*, 42 TRADEMARK REP. 409 (1952).

THE RATIONALE FOR SLOGAN PROTECTION

The purpose of protecting trademarks at common law is two-fold: first, the public should not be deceived as to the source of goods that are offered for sale; and second, the manufacturer should be protected from the impairment of the value of the good will that the mark represents.[3] A purchaser often relies on the trademark to identify the source of goods when making a purchase, and the use of two or more of the same or similar marks on goods of substantially the same character might deceive him. Then too, one person might use the mark of another on different goods to take advantage of his established reputation and good will. By so doing the appropriator would "dilute" the value of the good will of the trademark.

When a slogan is prominently displayed on the goods themselves or closely associated with their sale, the same danger occurs. The public notices that these slogans are being repeatedly displayed, and it associates them with the product. Words that are otherwise in common use may acquire a secondary meaning and become distinctive rather than serve as mere informational advertising devices. At common law protection has been given to slogans when a wrong has clearly been committed. For example, in *Bickmore Gall Cure Co. v. Karns* [4] the complaining party's product became known as WORK THE HORSE CURE. A competitor's use of the phrase ALWAYS WORK THE HORSE WHILE USING THE CURE was enjoined. In *Cash, Inc. v. Steinbook* [5] the Cash Company had long used the slogan EVERY GOOD NUT THAT GROWS. A competitor was enjoined from using EVERY FINE NUT THAT GROWS. Protection was also given in *Estate Stove Co. v. Gray & Dudley* [6] where the use of the slogan NO, THIS IS NOT A VICTROLA was held to be unfair competition because of a competitor's use of the slogan NO, THIS IS NOT A PHONOGRAPH.

Hence the courts have recognized that there has been a wrong committed when there has been either a "palming off" or "dilution." The Federal Trade-Mark Act of 1946 [7] was designed not to replace the common law in this area but to provide other remedies and, more important, to provide a means of determining the right to use a particular mark or slogan—a fact that must be proven in the action at common law.

FEDERAL LEGISLATION AND TRADE SLOGANS

Congress, in 1946, passed the Lanham Trade-Mark Act.[8] Its purpose among other things was to afford greater protection to trademarks than can be achieved under the common law.[9] The Act established a principal register where trademarks, service marks, collective marks and certification marks are registered.[10] All marks that distinguish the applicant's goods and that are not violative of certain specific provisions in section 2, set forth below, are entitled to registration. Principal registration is constructive notice of the registrant's claim to ownership of the mark.[11] After five years the registration may not be cancelled except for forfeiture.[12] Moreover, "a principal registration is prima facie evidence of ownership, validity of the registration and of the registrant's exclusive right to use the mark in commerce, subject only to such conditions and limitations as may have been imposed in the grant of the registration." [13]

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[3] For a good discussion of the history and purpose of trademarks, see Rogers, *The Lanham Act and the Social Function of Trademarks,* 14 LAW & CONTEMP. PROB. 173 (1949).

[4] 134 Fed. 833 (3rd Cir. 1905).

[5] 220 App. Div. 569, 222 N.Y.S. 61, *aff'd,* 247 N.Y. 531, 161 N.E. 170 (1927).

[6] 41 F.2d 462 (6th Cir. 1930).

[7] 60 Stat. 427 (1946), 15 U.S.C. §§ 1051–1127 (1958).

[8] *Ibid.*

[9] U.S. Code Cong. & Ad. News 1946, pp. 1274–78.

The Lanham Act also establishes a supplemental register to provide for the registration of certain marks that do not comply with the requirements of section 2.[14] The main purpose of establishing this register was to furnish protection to trademarks used in foreign commerce.[15] The effect of such registration is limited. It may be cancelled at any time on a showing of damage, and it is not evidence of ownership, validity or the exclusive right to use the mark.[16]

The question of whether the legislature intended to permit the registration of slogans under the Act has never been clearly established. Section 2 provides:

> No trade-mark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . .
>
> (e) Consists of a mark which, (1) when applied to the goods of the applicant is merely descriptive or deceptively misdescriptive of them, or. . . .
>
> (f) Except as expressly excluded in paragraphs (a), (b), (c), and (d) of this section, nothing herein shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce. . . .[17]

Section 45 of the Act defines a trademark to include "any name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others." [18] On the other hand, that same section defines a service mark, which is registrable "in the same manner and with the same effect as are trademarks," [19] to mean "a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others and includes without limitation the marks, names, symbols, titles, designations, *slogans*, character names, and distinctive features of radio or other advertising used in commerce." [20]

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[10] 43 Stat. 647 (1924), 15 U.S.C. § 1052 (1958).

[11] 60 Stat. 435 (1946), 15 U.S.C. § 1072 (1958).

[12] 60 Stat. 433 (1946), 15 U.S.C. § 1065 (1958).

[13] Robert, *Commentary on The Lanham Trade-Mark Act,* 15 U.S.C.A. §§ 81–1113 (1948), at 280.

[14] 60 Stat. 435 (1946), 15 U.S.C. § 1091 (1958).

[15] Robert, *Commentary on the Lanham Trade-Mark Act,* 15 U.S.C.A. §§ 81–1113 (1948), at 273, 274.

[16] 60 Stat. 436 (1946), 15 U.S.C. §§ 1092, 1094 (1958).

[17] 60 Stat. 428 (1946), 15 U.S.C. § 1052 (1958).

[18] 60 Stat. 443 (1946), 15 U.S.C. § 1127 (1958).

[19] 60 Stat. 429 (1946), 15 U.S.C. § 1053 (1958).

Strictly construing these sections of the Act, it would seem that the legislature, by including slogans in the definition of service marks but excluding them from the definition of trademarks, intended that slogans should not be registrable as such on the principal register.[21] Furthermore, section 23, which deals with supplemental registration, provides:

> For the purposes of registration on the supplemental register, a mark may consist of any trademark, symbol, label, package, configuration of goods, name, word, *slogan,* phrase, surname, geographical name, numeral, or device or any combination of any of the foregoing, but such mark must be capable of distinguishing the applicant's goods or services.[22]

If Congress intended that slogans be registered, why did it exclude them in defining a trademark in section 45 and include the term within other definitions set forth in the Act? On the other hand, it can be argued that Congress intended to provide for the registration of slogans as trademarks since it provided in section 2 that no mark shall be refused registration "on account of its nature" unless it is merely descriptive, and the mark will not be refused registration if in this situation it has become "distinctive of the applicant's goods in commerce." [23]

The problem of interpreting these provisions, complicated by the fact that slogans are seldom distinctive in themselves but become so only through use, has been a difficult task for the Patent Office and the courts. The Trade-Mark Act of 1905, a forerunner to the Lanham Act, although much more confined in the scope of its protection, was similar in purpose.[24] Many of the decisions of the Patent Office in reference to this Act later had an adverse effect on interpretations of the Lanham Act. The Act of 1905 did not provide for the registration of "secondary meaning" marks but only for marks that in and of themselves were distinctive and that distinguished the merchant's goods.[25] Since slogans ordinarily become distinctive only through continuous use, very few were registered under that Act. The problem of distinctiveness is illustrated by the decision in *Kellogg Toasted Corn Flake Co. v. Quaker Oats Co.,*[26] where the appellant attempted to protect the use of TOASTED CORN FLAKES. The court said:

> Indeed, appellant's product is corn, flaked and toasted; it is in truth "toasted corn flakes", and is described with accuracy by these words; in short, the words, apart from their separate descriptive qualities, collectively

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[20] 52 Stat. 639 (1938), 15 U.S.C. § 1127 (1958). (Emphasis added.)

[21] See *Ex parte* Robert Hall Clothes, Inc., 97 U.S.P.Q. 463 (1953).

[22] 60 Stat. 435 (1946), 15 U.S.C. § 1091 (1958). (Emphasis added.)

[23] 60 Stat. 428 (1946), 15 U.S.C. § 1052 (1958).

[24] For a history and discussion of the provisions of the 1905 Act, see 2 NIMS, UNFAIR COMPETITION AND TRADE-MARKS §§ 224–54 (4th ed. 1947).

[25] An amendment of 1920 provided a ten-year condition to "secondary meaning" marks before they could be registered. See 2 NIMS, UNFAIR COMPETITION AND TRADE-MARKS § 229(a) (4th ed. 1947).

[26] 235 Fed. 657 (6th Cir. 1916).

> describe with precision the chief ingredient, its form and ultimate mode of treatment . . . [it is futile] to insist that words describing the product with exactness, as here, can be regarded as fanciful or arbitrary symbols designed to show the origin of the product.[27]

The holding of the case—that a combination of words could not be distinctive where they merely describe the quality and nature of the goods to which the words are affixed—was followed in the case of *In re Dolly Varden Chocolate Co.*[28] In that case the court upheld a refusal of the Patent Office to register WHEN WORDS FAIL—SEND. The slogan had been in use for a long time and had become associated with the sale of the applicant's candy. The court held that the phrase was not distinctive and hence not registrable. Similarly, in *Burmel Handkerchief Corp. v. Cluett, Peabody & Co.*,[29] the court said that the expression HANDKERCHIEF OF THE YEAR merely describes "in condensed fashion handkerchiefs having every characteristic as to material, quality and style that the best handkerchiefs should possess." [30]

In each of these cases the phrase sought to be registered was common and undistinctive in itself, but through use had become distinctive. The refusal of the Patent Office to register these slogans was excusable under the Act of 1905 since that Act did not provide for marks that had become distinctive through use.[31] The Act of 1946 does so provide,[32] but for a number of years after its passage the Patent Office continued to reason in the same way as in those cases previously discussed. For example, in *Ex parte Booth Bottling Co.*[33] the Examiner of Trade Marks refused to register the phrase 5 FULL GLASSES IN EVERY BOTTLE, which had been in extensive use as a slogan for soft drinks. The Commissioner, in affirming the determination of the Examiner, decided that a phrase of this type, which merely indicates the quantity of merchandise in a container, cannot be considered as serving to indicate the origin of appellant's product.[34] Later the same year the Commissioner, in *Ex parte William Skinner & Sons*,[35] again affirmed a refusal by the Examiner to register a slogan. The slogan sought to be registered as a mark in that case consisted of the words LOOK FOR THE NAME IN THE SELVAGE. The Commissioner, in denying the registration of this mark, said:

> These words do not, in and of themselves, identify or distinguish the article. They are entirely collateral and subordinate to the applicant's trade marks, which do distinguish this fabric and serve only as an advertising feature calling attention to those trade marks.[36]

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[27] *Id.* at 662.

[28] 2 F.2d 943 (D.C. Cir. 1924).

[29] 127 F.2d 318 (C.C.P.A. 1942).

[30] *Id.* at 321.

[31] See note 25, *supra*.

[32] 60 Stat. 428 (1946), 15 U.S.C. § 1052 (1958).

[33] 80 U.S.P.Q. 78 (1949).

[34] *Id.* at 81.

[35] 82 U.S.P.Q. 315 (1949).

[36] *Id.* at 317.

In *Ex parte American Enka Corp.*[37] the Examiner refused principal registration of a trademark unless the words THE FATE OF A FABRIC HANGS BY A THREAD were disclaimed. The applicant refused to do so. The Examiner held it was a slogan incapable of identifying or distinguishing the applicant's goods. The Commissioner in his opinion used broad language to the effect that slogans as such are not entitled to principal registration.[38]

Two years after the *American Enka Corp.* decision the Commissioner was reversed by the district court for the District of Columbia.[39] The court, finding that the slogan was distinctive, directed its registration. No explanatory opinion was pronounced, but the policy of the Patent Office appeared to have been significantly affected by this order. Shortly thereafter the slogans of the Morton Salt Company, WHEN IT RAINS IT POURS,[40] and Nehi's drinks, BEST BY TASTE TEST,[41] were reported in the Official Gazette to have been officially accepted for registration. However, the problem of the registration of slogans was by no means settled. A year after the court's decision in the *American Enka* case the Examiner of Trade Marks refused to register WHY PAY FOR OVERHEAD WHEN YOU CAN'T WEAR IT on the application of the Robert Hall Clothiers Company.[42] This determination was not based on the fact that the slogan was undistinctive. The court stated:

> The omission of any reference to slogans in connection with the trade-marks for goods registrable on the Principal Register, and the specific inclusion of slogans in connection with marks registrable on the Supplemental Register, would seem to indicate an intention to confine the registration of slogans used on goods to the Supplemental Register.[43]

This retreat from the more liberal position taken by the Patent Office was again reversed in *Ex parte Robbins & Myers, Inc.*[44] when the Assistant Commissioner overruled the Examiner. The *Robbins* case involved an appeal from the refusal of the Examiner to register MOVING AIR IS OUR BUSINESS as a slogan to promote the sale of electric fans for circulating air. The refusal to register was based on three grounds: (1) the expression is unregistrable because it is regarded as a descriptive trade slogan; (2) the omission of any reference to slogans in connection with marks registrable on the principal register and the specific inclusion of slogans in connection with marks registrable on the supplemental register would seem to indicate an intention to confine registration of slogans as trademarks to the latter register; and (3) the burden of establishing secondary meaning of such a term is not discharged by mere reference to five years' exclusive use.

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[37] 81 U.S.P.Q. 476 (1949), *petition for reconsideration denied,* 82 U.S.P.Q. 41 (1949).

[38] 81 U.S.P.Q. 476, 479 (1949).

[39] American Enka Corp. v. Marzall, 92 U.S.P.Q. 111 (D. D.C. 1952).

[40] OFFICIAL GAZETTE, Feb. 19, 1952, p. 631.

[41] OFFICIAL GAZETTE, March 3, 1953, p. 33.

[42] *Ex parte* Robert Hall Clothes, Inc., 97 U.S.P.Q. 463 (1953).

[43] *Id.* at 464.

[44] 104 U.S.P.Q. 403 (1955).

With respect to the second proposition, the Assistant Commissioner refused to follow the reasoning of the *Robert Hall Clothiers* case on the grounds that "such a narrow and restricted construction, if correct as a matter of law would preclude registration on the principal register of phrases and numerals, and it could be argued that surnames and geographical names were also unregistrable on the principal register." [45] The Commissioner decided that since there is nothing in the statute prohibiting the registration of slogan trademarks on the principal register, the only question is whether the slogan has acquired a secondary meaning so as to become distinctive of the applicant's goods. He concluded that the slogan MOVING AIR IS OUR BUSINESS had a "certain *double entendre*," and as a result it was not merely descriptive; it was distinctive. It distinguished the goods offered for sale and was entitled to registration.

The decision in this case prompted Mr. Lunsford, a prominent authority on trademarks, to conclude:

> There is no doubt that if a slogan is distinctive, it is entitled to registration on the Principal Register. There now exists uniformity of decision in the Patent Office and the courts in the restricted field of registrability of slogans though it took three years to attain this desirable result.[46]

The problem was not so easily resolved. Even if Mr. Lunsford's conclusion was correct at this time, there remained the problem of determining whether a particular slogan was distinctive. In the same year that Mr. Lunsford's article appeared, the Commissioner, in *Ex parte Deering, Milliken & Co.*,[47] held that the slogan LOOK FOR THE SILVER LINING, in use on textile fabrics made of cotton, rayon and other materials, was not entitled to principal registration. The Commissioner in this case said:

> Where, however, registration is sought on the Principal Register, the facts represented must support a conclusion that the slogan does in fact identify and distinguish the applicant's goods from the goods of others and not merely point out or refer to a characteristic of the goods themselves.[48]

Although this decision did not overrule the *Robbins* case, it did narrow its application since it appeared to require for registration that a slogan be distinctive in and of itself. Distinctiveness through use was overlooked —an unreasonable result in light of the specific terms of the Act.

The situation today with regard to the registration of slogans on the principal register is still unclear. It is true that the *American Enka* case established that slogans are registrable on the principal register notwithstanding the implication of their exclusion therefrom by their explicit inclusion in the provisions of sections 2 and 45. It is equally true that by the express terms of the Act the slogan must in some way be distinctive, and it must likewise distinguish the applicant's goods. The question of what sort of slogan will be held by the Patent Office to be distinctive and distinguish the applicant's goods is still unsolved. One writer suggests that the test is whether or not the slogan by its terms states an "unexpected thing in an unexpected way" and is not mere "trade puffery." [49] For example, the slogan TOPS FOR GOOD DRINKS was permitted principal registration when used for the sale of bottle caps because of its dual connotation.[50] Similarly, in the case of *In re Esslinger's Inc.*[51] was slogan THE FLAVOR OF THE DRAUGHT BEER IN A BOTTLE, used in the sale of beer, was granted principal registration. On the other hand, such slogans as OUT OF THIS WORLD,[52] used in the sale of auto trailer windows, and THE CHOICE OF ANIMAL CHAMPIONS,[53] used in the sale of veterinary medicine, were denied principal registration because they show little imagination and are mere "trade puffery."

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[45] *Id.* at 403.

[46] Lunsford, *Distinctive Packages and Slogans Are Registrable on the Principal Register*, 38 J. PAT. OFF. SOC'Y 329, 334 (1956).

[47] 109 U.S.P.Q. 69 (1956).

[48] *Id.* at 69.

PROTECTION OF TRADE SLOGANS OUTSIDE OF THE LANHAM ACT

Little protection is afforded slogans by other laws. The trade slogan is not entitled to protection under the copyright law.[54] The provisions in the laws of the states for the protection of trademarks and slogans are necessarily inadequate when a slogan is used for the sale of goods in interstate trade. Not all the states provide for registration of marks.[55] There is the hardship imposed upon a merchant by requiring him to register his mark in every state in which he sells his goods. The user of an unregistered slogan is protected, however, to some extent by the common law, inasmuch as the Lanham Act was intended merely to supplement and not to supplant the protection of the common law.[56] Nevertheless, in any action for trade infringement or unfair competition the advantages of principal registration are substantial.[57] Although many private organizations have taken steps to aid the merchant who uses an unregistered slogan by publishing such slogans in bulletins,[58] in litigation these sources are at best only evidence of use.[59]

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[49] Wehringer, *Slogans-Tests as Trademarks,* 42 J. PAT. OFF. SOC'Y 781, 788 (1960).

[50] *Ex parte* W. H. Hutchinson & Son, Inc., 111 U.S.P.Q. 244 (1956).

[51] 123 U.S.P.Q. 236 (1959).

[52] *In re* Hehr Mfg. Co., 120 U.S.P.Q. 541 (1959).

[53] *In re* Zirin, 125 U.S.P.Q. 587 (1960).

[54] Kitchens of Sara Lee, Inc. v. Nifty Foods Corp., 266 F.2d 541 (2d Cir. 1959). This case held that brand names, trade names, slogans and other short phrases cannot be copyrighted even if they are distinctively arranged or printed.

[55] See Diggens, *Federal and State Regulation of Trade-Marks,* 14 LAW & CONTEMP. PROB. 200 (1949).

[56] King Pharr Canning Operations v. Pharr Canning Co., 85 F. Supp. 150 (D.C. Ark. 1949).

[57] See notes 13, 14, 15, *supra.*

[58] See, *e.g.*, the *Bulletin of the U.S. Trademark Association.* In 1949, William Sunners published a book entitled AMERICAN SLOGANS to aid advertisers and agencies in determining the existence of slogans in use.

[59] AMDUR, TRADE-MARK & PRACTICE § 14 (Lanham Act ed. 1948).

CONCLUSION

The value of trade slogans and the benefits of federal registration are ample reason for providing the same protection to trade slogans as is now given to trademarks. The difficulties the Patent Office has faced in determining whether a slogan should be registered have been discussed. In summary, slogans that are imaginative, distinctive, and affixed to the goods or on display with the sale of the goods so as to serve as second trademarks are entitled to principal registration.[60] If a slogan is distinctive but does not meet one or more of these other qualifications, it may be registrable on the supplemental register and transferable to the principal register after five years.[61] Even where the applicant seeks registration on the supplemental register, the problem of determining whether the mark is distinctive remains.[62]

Federal protection of trade slogans is unsatisfactory today because (1) the Lanham Act as interpreted provides protection for only a few of the commercial slogans in use, and (2) the decisions of the Patent Office and the courts have not adequately provided guideposts to principal registrability. The problem derives from the basic distinction that exists between a trade slogan and a trademark. As noted before, generally only those slogans that also serve as trademarks are granted principal registration. However, a slogan is seldom, if ever, intended to serve as a trademark. As a result it is unreasonable to insist that a slogan serve as a trademark to be entitled to registration. Furthermore, it is unreasonable to require a slogan to serve as a trademark before granting it registration, because then there is no protection for those slogans that are imaginative and distinctive but are not affixed to or associated with the actual sale of the goods. Imaginative slogans that are not affixed to the product should also be given the benefits of principal registration.

If it is assumed that slogans should have the benefits of registration, whether or not they serve as trademarks, the question remains how this can be achieved. The Lanham Act now provides protection for the "trademark" slogan. The copyright law could be expanded to protect the "non-trademark" slogan, or the Lanham Act could be amended to provide the same protection for all imaginative *or* distinctive slogans as is now given to trademarks on the principal register.

The first solution suggested is more logical, but as a practical matter it is less feasible. It is difficult to understand why imaginative slogans have not before been entitled to the benefits of the copyright law. Although slogans are intended solely for commercial purposes and therefore distinguishable from ordinary literary material that is the subject of copyright, nevertheless they are often the product of ingenious and creative minds and thus, in a sense, within the general purpose of copyright protection. But to permit all "qualified" slogans to be copyrighted would unreasonably extend the copyright law beyond the limits of its true purpose. Moreover, the Copyright Office would be faced with unfamiliar questions involving determinations of commercial use. If, instead, protection were given under the Lanham Act for "trademark" slogans and under the copyright law for imaginative "non-trademark" slogans, there would be two undesirable results. First, "secondary meaning" slogans that did not function as trademarks would not be protected. Second, the problem of determining whether a slogan was a trademark would still be present.

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[60] 43 Stat. 647 (1924), 15 U.S.C. § 1052 (1958).

[61] Diggens, *The Lanham Trade-Mark Act*, 37 TRADE-MARK REP. 419, 447, 448 (1947).

[62] For cases holding slogans not distinctive for purposes of supplemental registration, see *Ex parte* United States News Publishing Corp., 99 U.S.P.Q. 322 (1953) (USEFUL NEWS FOR IMPORTANT PEOPLE); *Ex parte* Stewart's Ice Cream Co., 111 U.S.P.Q. 238 (1956) (MAKE YOUR OWN SUNDAE); *In re* Doane Agricultural Service, Inc., 120 U.S.P.Q. 468 (1959) (AMERICA'S AGRICULTURAL AUTHORITY).

The second solution can and should be achieved. The establishment of a separate register under the Trademark Act would be a recognition that slogans are not trademarks, nor intended to function as such. Nevertheless, they should be entitled to comparable protection. There would be no unusual burden on the Patent Office in establishing a third register for slogans. Registering of slogans in the same office as trademarks would be efficient, and it would be convenient to the commercial world.

BENJAMIN P. WHITAKER, JR.

THE SANTA MARIA INCIDENT: A GREY ZONE BETWEEN UNRECOGNIZED INSURGENCY ON THE HIGH SEAS AND PIRACY JURE GENTIUM[1]

THE INCIDENT

On Sunday, January 22nd at 1:30 A.M. on the high seas off the Curacao coast in the Caribbean Sea, Henrique Malta Galvão[2] and twenty-three uniformed confederates seized a Portuguese passenger liner, the Santa Maria. In a gun and grenade battle Galvão quickly gained control of the 20,906-ton vessel and its occupants: three hundred crewmen and six hundred and seven passengers from nine nations.[3] A previous boarding in La Guaira, Venezuela made possible the capture that resulted in the death of the ship's third pilot and the wounding of several crewmen.[4] Galvão threatened to scuttle the ship if there were any attempts to retake it, and, refusing to keep the ship on course, he set his destination for Angola, Africa.

On Tuesday the 24th, Galvão radioed General Humberto Delgado,[5] the National Broadcasting Company, and the New York Times. His message to Delgado said that the ship had been taken under the authority conferred upon him by Delgado and the National Independence Liberation Junta.[6] Referring to the 1958 Portuguese presidential election, he hailed Delgado as "Chief of state elected by the people." [7] He requested Delgado to obtain recognition for the ship as being in a state of belligerency. In his messages to NBC and the New York Times, Galvão gave his assurance that the physical and moral well-being of the passengers had not been affected by the seizure and that they would be released in a neutral port.

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[1] Used herein interchangeably with piracy under the law of nations and international piracy.

[2] Galvão is a bitter political opponent of Portugal's dictator, Premier Salazar. He is a former Portuguese army captain, and a playwright who became a member of the National Assembly. The sixty-three-year-old foe of Salazar was found guilty of treason in March, 1953. Although his conviction was then set aside, he remained in jail until he was again arraigned and tried in 1958. At that trial he was again convicted, and given an eighteen-year sentence. While serving his sentence, Galvão spent some time in a Lisbon hospital. It was from there that he escaped in June, 1959. N.Y. Times, Jan. 24, 1961, p. 2, col. 4; *id.*, Jan. 25, 1961, p. 12, col. 7; Galvão, *Salazar: Man and Mask,* 190 THE NATION 24, 26 (Jan. 1960).

[3] N.Y. Times, Feb. 5, 1961, § 4, p. 2E, col. 2.

[4] *Id.*, Jan. 25, 1961, p. 12, col. 1.

[5] General Delgado represented Portugal in Canada and at NATO, and his presidential campaign in 1958 was a milestone in the political history of Portugal since he was the first opposition candidate who refused to withdraw from the race against the Salazar candidate. He received enthusiastic acclaim and twenty-three per cent of the vote. *Id.*, Jan. 26, 1961, p. 14, col. 8; *id.*, Jan. 29, 1961, § 4, p. 2E, col. 1.

[6] *Id.*, Jan. 25, 1961, p. 13, col. 1. The National Independence Liberation Junta is the name given by Galvão to the revolutionary movement against Premier Salazar and the Portuguese regime.

[7] *Id.*, Jan. 25, 1961, p. 1, col. 5. Delgado claims he lost the election because of the unfair tactics practiced by the incumbent regime and fraud in the counting of the election returns. *Id.*, Jan. 25, 1961, p. 12, col. 8.

He directed that further communications be made through General Delgado. The exiled Delgado admitted that the seizure was a political act carried out by his forces with his knowledge and approval. As chief of the National Independence Movement, Delgado announced that Galvão had been previously named secretary-general of the movement.

The Portuguese government requested and received the aid of United States, British, and Canadian naval forces in pursuing the Santa Maria. Cruisers, search planes, and an atomic submarine were sent by the United States Navy to track the seized ship. In addition, the Portuguese regime, which had been in power for thirty-two years, sent reinforcements to their island provinces to make certain that Galvão would not set up a government in exile anywhere in Portuguese territory.[8]

Delgado sent demands to the United States and British ambassadors in Rio de Janeiro to halt interference at once. He stated: "[The] *Santa Maria* case does not represent mutiny or piracy but appropriation of Portuguese transport by Portuguese for Portuguese political objectives. . . . War is war and this is war on Portuguese territory." [9] He also asked that all governments aid in the liberation of Portugal from the slavery imposed by totalitarian government. The general said that the Santa Maria was specifically chosen because of the "convenience of dates," meaning that at that time the ship was in a favorable location to receive aid from the new Brazilian president.[10] Delgado then named Galvão "Delegate Plenipotentiary" [11] for revolutionary action against Portuguese Premier Salazar's government [12] and ordered him to set up "an Independent Junta of Liberation" [13] aboard the captive Santa Maria liner.

Salazar's regime denounced the captors as pirates: "The men who attacked the Santa Maria are not politicians, or ideologists. They are just outlaws." [14] The Portuguese government contended that all maritime nations were duty bound to halt such men by all the means at their disposal and that under the provisions of the North Atlantic Treaty adopted in 1949, the United States had an obligation to help Portugal recover her legal property.[15]

Meanwhile, Galvão negotiated with United States Rear Admiral Allen

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[8] *Id.*, Jan. 27, 1961, p. 2, cols. 5 & 6.

[9] *Id.*, Jan. 25, 1961, p. 1, col. 2 (city ed.); *id.*, Jan. 26, 1961, p. 14, col. 3.

[10] Jânio Quadros was inaugurated as Brazil's new president on January 31, 1961. Outgoing President Kubitschek's administration would not give Galvão the assurances that he subsequently received from Quadros. *Id.*, Jan. 26, 1961, p. 15, col. 1; *id.*, Feb. 2, 1961, p. 4, col. 6.

[11] *Id.*, Jan. 28, 1961, p. 1, col. 7.

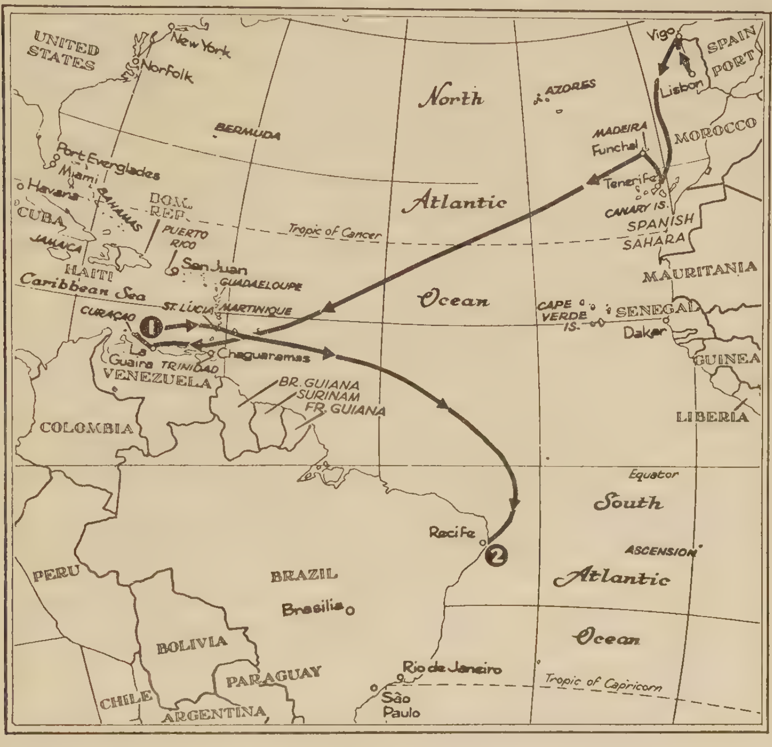
[12] Dr. Salazar has ruled Portugal since 1928. The features of his "organic corporative state" (critics call it "clerico-fascist") include one-party politics, strict press censorship, sweeping powers for the secret police (P.E.D.E.), church control of schools and prohibition of strikes. Nearly half the nine million Portuguese are said to be illiterate. The country's living standard is one of Europe's lowest; a small group of families—critics say only fifty—dominate the economy and Portugal's colonial empire. *Id.*, Jan. 29, 1961, § 4, p. 2E, col. 1.

[13] *Id.*, Jan. 28, 1961, p. 1, col. 7.

[14] *Id.*, Jan. 25, 1961, p. 1, col. 6 (city ed.). Salazar's spokesman expressed doubt that his political opponents in Portugal had any connection with "the wicked act committed by this gang of *pirates*." *Id.*, Jan. 25, 1961, p. 1, cols. 6 & 7. (Emphasis added.)

[15] *Id.*, Jan. 27, 1961, p. 2, col. 6 (city ed.).

Smith, Jr., commander of the U. S. Navy's Caribbean Sea Frontier, who assured the rebels of a United States "hands off" policy. The Santa Maria was then sailed to the coast of Recife, Brazil. From there the promised asylum to the captors from the president of Brazil tempted the ship to the edge of Brazilian territorial waters. Aboard ship the captors were faced with problems of engine trouble, rapidly dwindling supplies, and risk of attack by Portuguese ships. At Recife, the passengers and crew were removed from the ship under a special arrangement worked out between Brazilian officials and the rebels.[16] The ship then returned to a position beyond the three-mile limit.[17] Eventually, through negotiations with the Brazilian government, a formal surrender was effected. On February 3, the rebels accepted Brazilian political asylum, an essential part of the voluntary surrender agreement, and thus ended their twelve-day adventure. Galvão climaxed his surrender to the Brazilian officials with a political declaration entitled "The First Revolutionary Proclamation of the Portuguese National Independence Liberation Junta." [18] Galvão proclaimed a twentieth century revolution against the unjust social order of Portugal [19] and advocated its destruction and replacement by agrarian and urban reform.[20] Within twenty-four hours after surrender the liner had


UNITED STATES
New York
Norfolk
BERMUDA
North
AZORES
Vigo
SPAIN
PORT
Lisbon
MADEIRA
Funchal
MOROCCO
Port Everglades
Miami
Havana
BAHAMAS
CUBA
DOM. REP.
PUERTO RICO
JAMAICA
HAITI
San Juan
Tenerife
CANARY IS.
Atlantic
Tropic of Cancer
SPANISH SAHARA
Caribbean Sea
GUADAELOUPE
ST. LUCIA
MARTINIQUE
MAURITANIA
CURACAO
1
Ocean
CAPE VERDE IS.
SENEGAL
Dakar
La Guaira
TRINIDAD
Chaguaramas
VENEZUELA
GUINEA
BR. GUIANA
SURINAM
FR. GUIANA
COLOMBIA
LIBERIA
Equator
South
Recife
2
ASCENSION
PERU
BRAZIL
Atlantic
Brasilia
Ocean
BOLIVIA
PARAGUAY
Rio de Janeiro
Tropic of Capricorn
São Paulo
CHILE
ARGENTINA

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[16] *Id.*, Feb. 1, 1961, p. 3, col. 1.

[17] *Id.*, Feb. 3, 1961, p. 1, col. 1.

[18] *Ibid.*

[19] *Id.*, Feb. 3, 1961, p. 3, cols. 2 & 3.

[20] *Ibid.*

been returned by the Brazilian government to the Portuguese government and eventually to the owners.[21]

In view of the legal speculations concerning the incident there is an apparent need for a re-examination of what constitutes piracy *jure gentium* as opposed to mere acts of unrecognized insurgency upon the high seas.

DEFINITIONS, DISTINCTIONS, AND FEDERAL LAW ON PIRACY AND PRIVATEERING

Piratical activity reached its zenith in the period from 1680 to 1730.[22] The founders of the United States recognized the threat of piracy on the high seas and, as a result, provided in Article I, section 8, of the Constitution that "The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations. . . ." By phrasing the clause in this way, the founding fathers clearly intended to preserve a distinction between international piracy and common law felonies. The provision also suggests that there is a distinction between piracy under domestic law committed upon the high seas and piracy under the law of nations. The first legislation under the Constitution involving piracy caused troublesome adjudication.[23] The present statute,[24] which, except in its penalty provision, substantially reenacts section 5 of the act of March 3, 1819,[25] provides: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." [26] This provision is the only one expressly making international piracy justiciable in our federal courts.

Although there is no definition of piracy that is universally accepted as accurate, one definition that is often used is as follows: Piracy is robbery or forcible depredation on the high seas without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility.[27] Since attempted definitions of international piracy have often been inadequate, a marginal area of uncertainty has developed as to types of activity not universally recognized as subject to international sanctions. Domestic piracy or piracy that comes within the reach of a nation's territorial jurisdiction, presents few problems. By reason of an established territorial principle, acts of violence, detention, or depredation committed within a nation's territorial jurisdiction by one private vessel against another, or by one person against another, or in any variation of the two, are within the power of that nation to try and to punish.[28] This is true because that nation alone has the paramount interest in maintaining peace and good order within its own limits. Only where there is a direct injury or threat to the interests of a nation or its nationals does any such piratical act become justiciable under domestic law. The tenor of the federal statute is such as to illustrate this point.[29] On the high seas, however, piracy is a threat to every nation, and hence different problems of international law arise. Some of the problems that result from attempting to distinguish between "domestic" and "international" piracy arise by reason of an assimilation by statute of collateral offenses, such as showing false lights, into piracy law.[30] These offenses are included within the federal piracy laws but constitute neither domestic nor international piracy in the traditional sense. These assimilated offenses were apparently so categorized because of their resemblance to piracy, their connection with it, or because of legislative inability to know where to place the offense without creating a new crime.[31] The statutes of many other countries leave the definition of piracy to the law of nations.[32] Since a codified definition of international piracy has not been adopted by all nations or even all member nations of the United Nations,[33] flexible criteria have been used to distinguish the offense.

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[21] *Id.*, Feb. 5, 1961, § 1, p. 25, col. 1.

[22] GOSSE, THE PIRATE'S WHO'S WHO 8 (1924).

[23] Dickinson, *Is the Crime of Piracy Obsolete?* 38 HARV. L. REV. 334, 342–48 (1925). Sections 8 to 12, inclusive, of the Federal Crimes Act of April 30, 1790, 1 Stat. 112, drafted by Alexander Hamilton, comprised the earliest federal legislation covering piratical activity. For the complicated later history of federal piracy legislation, see Dickinson, *supra* at 348–50.

[24] 18 U.S.C. § 1651 (1958).

[25] 3 Stat. 510, 513–14 (1819); see Dickinson, *supra* note 23, at 345–46. Under section 5 of the Act of 1819, the crime of international piracy was punishable by death, whereas the present statute provides a maximum penalty of life imprisonment.

[26] In United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820), the term "piracy as defined by the law of nations" was held to be a constitutionally adequate definition. For similar statutes of other nations, see Harvard Research in International Law, *A Collection of Piracy Laws of Various Countries,* 26 AM. J. INT'L. L. SUPP. 893–1013 (1932). According to Professor Lenoir, as of 1934, Japan, Russia and Turkey were probably the only larger countries not having piracy laws in force. Lenoir, *Piracy Cases in the Supreme Court,* 25 J. CRIM. L. & CRIM., 532, 534 n. 16 (1934). As stated in THE FEDERALIST No. 42, at 280 (Macy ed. 1945) (Madison), "The definition of piracies might . . . be left to the law of nations. . . ." See 18 U.S.C. § 1651 (1958).

[27] United States v. Baker, 24 Fed. Cas. 962, 965 (No. 14501) (C.C. S.D. N.Y. 1861); see 2 MOORE, INTERNATIONAL LAW DIGEST 971 (1906).

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[28] Wildenhus's Case, 120 U.S. 1 (1887); 2 U.N. Conference on the Law of the Sea, Convention on the Territorial Sea and the Contiguous Zone, U.N. Doc. No. A/CONF. 13/L.52 (arts. 2, 16, 17 & 19) (1958), reprinted in 2 U.N. CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS xi (A/CONF. 13/38) (U.N. Pub. Sales No. 58 V. 4) (1958) 132, 134 [hereinafter cited as OFFICIAL RECORDS], also reprinted in 52 AM. J. INT'L. L. 834, 838–39 (1958); 2 U.N. Conference on the Law of the Sea, Convention on the High Seas, U.N. Doc. No. A/CONF. 13/L. 53 (art. 23) (1958), reprinted in 2 OFFICIAL RECORDS 135–38, also reprinted in 52 AM. J. INT'L L. 842, 847; Harvard Research in International Law, *Draft Convention on Piracy,* 26 AM. J. INT'L. L. SUPP. 739, 744 (art. 7) (1932) [hereinafter referred to as Harvard Research, *Draft Convention on Piracy*]; *cf.* BRIERLY, LAW OF NATIONS 238 (1955).

[29] See 18 U.S.C. §§ 1651–61 (1958).

[30] See Harvard Research in International Law, *A Collection of Piracy Laws of Various Countries, supra* note 26, at 909, setting forth article 106 of the penal code of Brazil of Oct. 11, 1890, which, among other things, defined the crime of "piracy" to include serving as a crew member of an armed vessel which navigates without legitimate voyage papers, or trading with, or furnishing aid to, known pirates. See also 18 U.S.C. §§ 1658, 1660, 1661 (1958). For a discussion of statutes under which the accused is prosecuted and condemned *as though he were a pirate,* see Genet, *The Charge of Piracy in the Spanish Civil War,* 32 AM. J. INT'L L. 253, 256–59 (1938).

[31] Genet, *supra* note 30, at 257–58.

[32] See Harvard Research in International Law, *A Collection of Piracy Laws of Various Countries, supra* note 26, at 893–1013 *passim.*

[33] 1958 U.N. YEAR BOOK 380.

Furthermore, piracy must not be confused with privateering. The latter generally involves the same acts as those involved in piracy but is committed only against the national enemy of that government or belligerent group that has granted the actor his official commission or letters of marque.[34] This activity has normally taken place during wartime.[35] The Constitution of the United States, Article I, section 8, provides, in part: "The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal . . . ." Even under a validly issued privateer's commission, the holder may by his act throw off his character as a privateer and assume that of a pirate.[36] Actors under such commissions must look to the issuing government for protection. In 1856, privateering was generally abolished among nearly all maritime states by the Declaration of Paris; in all subsequent wars among signatory and acceding powers, no letters of marque have been granted.[37]

Piracy *jure gentium* must be defined and distinguished from domestic offenses because of the doctrine of universal jurisdiction. Under that doctrine a mere rebel is subject only to punishment by the authority against whom he rebels.[38] On the other hand, the international pirate is within the reach of the law of all nations. He is an international criminal who may be pursued, destroyed or captured by any vessel.[39] Consequently, "to misqualify the act of rebel [sic] as that of a pirate is to assume a singular responsibility, since one thereby passes from the municipal sphere and consequently from the sanctions [of] . . . the internal law of the state, to the incomparably more severe sanctions provided by international law." [40]

The most modern and apparently accurate draft codification, adopted at the United Nations Conference on the Law of the Sea at Geneva in 1958,[41] defines and describes piracy *jure gentium* in the following terms:

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[34] 2 Hackworth, Digest of International Law 689–90 (1941); 2 Moore, *op. cit. supra* note 27, at 970; 7 *id.* at 535; Hall, International Law 453 (1880); 1 Hyde, International Law 776 (2d rev. ed. 1947); 3 *id.* at 1915; 2 Oppenheim, International Law 261 (Lauterpacht 7th ed. 1952).

[35] See 3 Hyde, *supra* note 34, at 1915–19; 2 Oppenheim, *supra* note 34, at 261–62.

[36] United States v. Furlong, 18 U.S. (5 Wheat.) 184, 201 (1820) (dictum); United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820).

[37] 2 Oppenheim, *op. cit. supra* note 34, at 262. For text of the Declaration of Paris pertaining to privateering, see 7 Moore, *op. cit. supra* note 27, at 561–62.

[38] Genet, *supra* note 30, at 254. Compare authorities cited note 28 *supra*.

[39] The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40 (1826) (per Story, J.); see Rev. Stat. §§ 4293–99 (1878), 33 U.S.C. §§ 381–87 (1958); Genet, *supra* note 30, at 254; Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 Am. J. Int'l L. Supp. 435, 440 (art. 9), 563–72 (1935); 2 U.N. Conference on the Law of the Sea, Convention on the High Seas, *supra* note 28, art. 19, reprinted in 2 Official Records 137, also reprinted in 52 Am. J. Int'l L. Supp. 842, 846 (1958); Harvard Research, *Draft Convention on Piracy*, *supra* note 28, at 744 (art. 6), 832; Hall, *op. cit. supra* note 34, at 222–23.

[40] Genet, *supra* note 30, at 254. The characterization of a pirate as *hostis humani generis* by Grotius, which was later perpetuated by Justice Story and others, is now said to be merely a rhetorical invective describing the odiousness of the crime rather than comprising an essential part of its definition. Dickinson, *supra* note 23, at 352.

[41] 2 U.N. Conference on the Law of the Sea, Convention on the High Seas, *supra* note 28, art. 15, reprinted in 2 Official Records 137, also reprinted in 52 Am. J. Int'l L. Supp. 842, 846 (1958).

> Piracy consists of any of the following acts: (1) Any illegal acts of violence, detention or any act of depredation, *committed for private ends* by the crew or the passengers of a private ship or a private aircraft, and directed: (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.[42]

Although neither this nor any other commonly accepted definition has been adopted multilaterally by all maritime nations or even by all member nations of the United Nations,[43] the quoted language represents an advanced stage in the development of a consensus among member governments on the essential elements of the crime of piracy.[44] The failure of a sufficient number of member governments to ratify the 1958 Convention on the High Seas, of which the piracy provisions are a part, may be accounted for in some degree by the absence of any urgent need to suppress on a world-wide scale the now almost defunct crime of piracy. This definition, however, is well supported by the modern weight of authority.[45] The recurring theme that permeates modern definitions is the policy of protecting the security of general commerce or transportation on the high seas from serious threats and menaces.[46] Significantly, it is a common requirement of modern draft codifications that to constitute international piracy the act must be committed *for private ends*.[47] If the common features implied in the accepted definitions of piracy *jure gentium* are properly distinguished, that act will neither be confused with domestic piracy nor with offenses assimilated into domestic piracy law.

APPLICATION OF THE STANDARD

The Santa Maria incident took place upon the high seas. Although illegal acts of violence and detention were committed by the captors, who had been passengers on the private ship, and were directed against the ship and persons on board, two vital elements of international piracy were missing: menace to the security of general commerce or transportation on the high seas, and violence, detention or depredation for private ends. Only the Santa Maria was directly affected and threatened; the interests of other maritime nations in safe shipping were not. Although the conversion of the ship for twelve days considerably irritated the ship's owners and occupants, the damage or threat seemed to be carried no further. The killing of the ship's third pilot was not indiscriminate but was committed as an act of political expediency: the crew barred the way to immediate success of the political revolt. The seizure of a single ship without manifesting universal hostility might be piracy *jure gentium,*[48] but such a seizure cannot be so characterized when committed by men who confine their violence, detention or depredation to vessels of their parent nation for a political purpose only.[49] Although holding such conduct to be piracy *jure gentium* would seem to be supported by some American and English judicial authority,[50] such a holding would be clearly against the modern weight of authority.[51]

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[42] *Ibid.* (Emphasis supplied.) The draft convention is not in force for lack of enough ratifications. *Compare* that draft convention and *League of Nations, Committee of Experts for the Progressive Codification of International Law, Sub-Committee Report* [hereinafter referred to as *League Committee Report*], LEAGUE OF NATIONS DOC. C. 196.M.70.1927.V, reprinted in 20 AM. J. INT'L L. SPEC. SUPP., 223–29 (1926), *with* Harvard Research, *Draft Convention on Piracy, supra* note 28, at 743 (art. 3), 768–822.

[43] See 1958 U.N. YEAR BOOK 380. For status of the Geneva conventions on the law of the sea, with respect to ratifications and accessions, see Manley, *The Geneva Conferences on the Law of the Sea as a Step in the International Law-Making Process,* 25 ALBANY L. REV. 17, 37 n. 70 (1961).

[44] The convention was signed on April 29, 1958, by representatives of Brazil, the United States and Portugal, 2 U.N. Conference on the Law of Sea, Final Act of the Conference, U.N. DOC. NO. A/CONF. 13/L. 58 (1958), reprinted in 2 OFFICIAL RECORDS 146–47. Of all the conventions proposed as part of 1958 United Nations Conference on the Law of the Sea, it received the most signatures; *viz.*, forty-nine. 1958 U.N. YEAR BOOK 380.

[45] See authorities cited notes 31, 34 & 42 *supra*.

[46] 2 HACKWORTH, *op. cit. supra* note 34, at 681–82; Dickinson, *supra* note 23, at 338; Genet, *supra* note 30, at 256.

[47] See authorities cited notes 41 & 42 *supra*.

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[48] United States v. Tully, 28 Fed. Cas. 226 (No. 16545) (C.C. D. Mass. 1812); Attorney-General of Hong Kong v. Kwok-a-Sing, L.R. 5 P.C. (1873).

[49] 2 U.N. Conference on the Law of the Sea, Convention on the High Seas, *supra* note 28, art. —, reprinted in 2 OFFICIAL RECORDS 137, also reprinted in 52 AM. J. INT'L L. SUPP. 842, 846 (1958); Harvard Research, *Draft Convention on Piracy, supra* note 28, at 798–808, 857–66; *League Committee Report, supra* note 42, reprinted in 20 AM. J. INT'L L. SPEC. SUPP. 228 (art. 1); 1 HYDE, *op. cit. supra* note 34, at 772–76; 2 HACKWORTH, *op. cit. supra* note 34, at 695; Dickinson, *The Unrecognized Government or State in English and American Law,* 22 MICH. L. REV. 118, 120 (1923); Dickinson, *supra* note 23, at 352; Genet, *supra* note 30, at 254.

It is interesting to note that Portugal's answer to the *League of Nations Questionnaire No. 6—Piracy* requested omission of the proposed draft phrase: "unless these acts [piracy] are inspired by purely political motives." Portugal thought this phrase might provoke awkward discussions. *League of Nations Committee of Experts for the Progressive Codification of International Law, Analysis of Replies to Questionnaire No. 6—Piracy,* 22 AM. J. INT'L L. SPEC. SUPP. 25, 31 (1928).

In 5 PRADIER-FODÉRÉ, DROIT INTERNATIONAL PUBLIC 822–23, as quoted in Harvard Research, *Draft Convention on Piracy, supra* note 28, at 863, it is said:

> Ce sont des infractions aux dispositions légales destinées à faciliter et à garantir la police des mers et la sûreté de la navigation, des atteintes portées au droit public du pays auquel on appartient et dont le navire porte le pavillon, des attentats isolés contre des navires nationaux ou étrangers et leurs équipages, ce sont des crimes commis contre la patrie, mais il n'est pas question de pillage, de vols, de rapines. Ceux qui commettent ces infractions et ces crimes ne courent pas les mers pour les écumer en vue de lucre; ils ne font pas du vol et de la déprédation un métier. Ils peuvent être des traitres, mais ils ne sont pas des bandits. Les infractions et les crimes par eux commis n'atteignent pas toutes les nations étrangères sans distinction; ces infractions et ces crimes ne constituent point un danger pour tous les peuples indistinctement; tous les États étrangers n'ont pas intèrêt à les punir; quelques-uns même, ceux par exemple dont le gouvernement a délivré des commissions pour la course, ont plutôt un intérêt contraire; la perpétration de ces crimes n'est pas, en un mot, la conséquence de l'adoption d'un genre de vie qui rende leurs auteurs les ennemis du genre humain. [Translation: They are violations of legal regulations drawn to facilitate and guarantee the policing of the seas and the safety of navigation, violations of the municipal law of one's native country—the nation under whose jurisdiction the vessel sails, isolated attacks against national or foreign ships and their crews. They are committed against one's own country, but they do not involve pillage, theft or ravages. Those who commit such violations or crimes do not cruise the seas to capture; they are not thieves by profession. They might be traitors, but they are not bandits. Their crimes do not affect all nations indiscriminately; these crimes do not endanger all peoples without distinction. All nations do not have an interest in punishing them; some nations even have an opposite interest. For example, certain governments may have commissioned them. The perpetration of these crimes is not, in a word, the consequence of the adoption of a way of life which constitutes these men as enemies of the whole human race.]

JUDICIAL AUTHORITY SYNTHESIZED AND APPLIED

If Galvão had purported to act under a commission or letters of marque issued by General Delgado, he would have been in a position similar in some respects to that of the defendant in *United States v. Klintock*.[52] In that case Klintock, a United States citizen, captured a Danish vessel while acting under a commission issued by one Aury who styled himself as "Brigadier of the Mexican Republic and Generalissimo of the Floridas." [53] Refusing to take cognizance of Aury's alleged authority and the existence of the Republic, the court held that Aury's commission did not exempt Klintock from the charge of piracy. Klintock's conviction was sustained.[54] Although the relationship between Klintock and Aury was somewhat similar to the one between Galvão and Delgado, Delgado and his followers had not yet qualified as belligerents because his movement did not demonstrate the required degree of magnitude and organization that was capable of assuming the functions and responsibilities of a *de facto* government.[55] Before the seizure of the Santa Maria, the existence of the movement had lacked political recognition. Galvão himself did not even purport to be a privateer but rather a political belligerent. Consequently, it seems that this was not an act of privateering, although a bona fide privateer's commission would have afforded a substantial measure of protection against prosecution for piracy *jure gentium*.[56]

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[50] See The Three Friends, 166 U.S. 1 (1897); The Ambrose Light, 25 Fed. 408 (1885); Dole v. Merchants' Mut. Marine Ins. Co., 51 Me. 465 (1863); *In re* Tivnan, 5 Best & Smith 645, 122 Eng. Rep. 971 (Q.B. 1864); Golding's Trial, 12 How. St. Tr. 1269 (1693). The opinions in *The Three Friends* and *The Ambrose Light* were careful to point out that their respective libel proceedings were in rem only and not trials upon indictments. In each case the court indicated that the result in a criminal prosecution might be different. *The Ambrose Light* decision was subjected to criticism. See *Insurgents Not Pirates*, 32 ALBANY L.J. 65 (1885); Wharton, *Insurgents as Belligerents*, 33 ALBANY L.J. 125 (1886).

[51] See authorities cited note 49 *supra*. Distinct from both views is the strict positivist minority theory that piracy cannot be a crime against the law of nations, but is always an offense against municipal law since it involves the actions not of states, but of individuals who have no legal status under international law; the latter being merely the means by which jurisdiction over such offenders is acquired by municipal authorities. One of the bases for the theory is that piracy is not sufficiently defined by international law. See Lenoir, *Piracy Cases in the Supreme Court*, 25 J. CRIM. L. & CRIM. 532, 535, 552 (1935); *cf.* dissenting opinion of Moore, J., in *The Steamship "Lotus,"* P.C.I.J., ser. A, No. 10 (1927).

[52] 18 U.S. (5 Wheat.) 144 (1820). For other cases involving the legal consequences of depredations carried on under color of letters of marque, see The Palmyra, 25 U.S. (12 Wheat.) 1 (1827); United States v. Baker, 24 Fed. Cas. 962 (No. 14501) (C.C. S.D. N.Y. 1861); United States v. Jones, 26 Fed. Cas. 653 (No. 15494) (C.C. D. Pa. 1813).

[53] United States v. Klintock, 18 U.S. (5 Wheat.) 144, 145 (1820).

[54] *Id.* at 153.

[55] See authorities cited note 34 *supra*. Compare United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820).

[56] See United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634–35 (1818); United States v. Bass, 24 Fed. Cas. 1028 (No. 14537) (C.C. D. N.Y. 1819); United States v. Hutchings, 26 Fed. Cas. 440 (No. 15429) (C.C. D. Va. 1817); United States v. Jones, 26 Fed. Cas. 653 (No. 15494) (C.C. D. Pa. 1813); 2 HACKWORTH, *op. cit. supra* note 34, at 689; 2 MOORE, *op. cit. supra* note 27, at 970; 7 *id.* at 535. *But see* 1 HYDE, *op. cit. supra* note 34, at 776.

The case most closely in point is the English case, *In re Tivnan*.[57] There the defendants were charged with piracy on the high seas. As passengers they took over an American schooner without a showing of any authority. With their motion for a writ of habeas corpus they offered proof of a commission issued by the southern confederacy. The court held that the prisoners were eligible for discharge, reasoning that under the extradition treaty between the United States and Great Britain the jurisdiction of the United States was exclusive.[58] However, the court was evenly divided on the question whether the conduct constituted piracy *jure gentium*. The case did not involve a trial upon an indictment, however, and the court was careful to avoid considering the merits. It confined itself to a construction of the treaty and to the issue of whether or not a prima facie case had been established. The modern view was expressed by Justice Blackburn, who said that defendants had not committed piracy *jure gentium,* but, rather, an act of war that was not triable as piracy anywhere. He considered that although the confederacy was not recognized, the defendants were belligerents.[59]

United States v. Hutchings,[60] involved a trial upon an indictment for piracy. After twelve days at sea, the name, colors, and articles of an American ship were changed to those of a *de facto* Buenos Aires government that was in revolt against Spain but theretofore unrecognized by the United States. Acting under a purported commission from the revolutionary government, the ship captured five Spanish vessels. The insurgents treated their prisoners humanely and acted towards other nations' vessels with perfect respect and courtesy. Although the court found that the commission was a nullity,[61] the defendant was acquitted. The case does not decide, but does suggest, that the insurgent's acts, similar to those of Galvão, were not piratical, even though they lacked the possible protection of a commission.[62]

In *United States v. Bass,*[63] the defendant was indicted for piracy. The commission under which he acted was a mere copy of an official commission; it lacked an official seal and had affixed to it only the name of the head of a revolutionary government. The court held that in a matter of life and death the fact that the defendant had a commission, though blank when acquired, was enough to exculpate him from the charge in the indictment.[64] The facts of the case are similar to the situation in which Galvão found himself, since there seems to be no essential legal distinction between an oral commission and a written commission issued in blank, to be filled in later. Both commissions should afford the same protection to those accused of international piracy. From the decisions in these cases it seems to follow that no crime of international piracy is committed when the accused acts under either a valid or a void commission solely for a political purpose and makes a capture on the high seas that is carefully confined to the vessels of the parent nation or its private citizens.

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[57] 5 Best & Smith 645, 122 Eng. Rep. 971 (Q.B. 1864).

[58] *Id.* at 681, 687, 695, 122 Eng. Rep. at 984, 986, 989.

[59] *Id.* at 687, 122 Eng. Rep. at 986.

[60] 26 Fed. Cas. 440 (No. 15429) (C.C. D. Va. 1817).

[61] *Id.* at 442.

[62] *Ibid.*

[63] 24 Fed. Cas. 1028 (No. 14537) (C.C. D. N.Y. 1819).

[64] *Id.* at 1029.

CUSTOM AND PRACTICE OF "OUTSIDE" NATIONS AND THE RESULTANT GREY ZONE

The custom and practice followed by "outside" nations (*i.e.,* nations other than those immediately involved in the dispute) in situations such as the instant case has been to decline to treat such actors or vessels as pirates [65] and to observe a strict policy of non-interference,[66] despite the parent nation's protests of piracy and exhortations for seizure and punishment.[67] This practice of non-interference causes a vacuum that precludes a judicial determination as to whether or not the crime of international piracy actually exists in situations involving such political factors. Outside nations know well that the parent nation suffering the effects of rebellion at sea will generally brand such activity as piratical. This characterization, in the absence of express treaty to the contrary, is not binding upon outside nations.[68] Furthermore, the practice of granting political asylum, such as was given to the captors of the Santa Maria, prevents any other country from asserting jurisdiction over the captors and results in another circumstance that practically precludes an adjudication upon the legal issues raised. As one writer has stated:

> Each sovereign state, being supreme within its own territory, is free to give [political or other refugees] . . . when found therein the protection of its sovereignty or to expel or to extradite them as its domestic policy or its international obligations may seem to dictate.[69]

The practice is not fully sanctioned in international law,[70] but it is effective because of the combination of the granting state's consent and the parent state's acquiescence.

As an outside national in the Santa Maria incident as well as in other incidents similar to it, the United States gives the responsibility for recognition to the Executive. The President of the United States, as our exclusive agent in international relations,[71] holds the power of decision in these matters.[72] The President's decisions and certifications on such matters are considered conclusive upon the courts.[73] He may ignore the activity entirely (as he often does, to avoid partiality and consequent friction with already friendly recognized governments), treat the conduct as piratical,[74] accord the actors recognition as insurgents,[75] or simply take protective measures to insure the safety of the United States' interests. Apparently the last alternative was chosen, as evidenced by the United States' tracking, communicating and negotiating with the rebels in order to protect the forty-two American citizens aboard. Although neither the President nor the State Department have made any official declaration as to the status of the ship or its captors, the Department did issue this statement:

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[65] 1 HYDE, *op. cit. supra* note 34, at 774–76; Genet, *supra* note 30, at 260–61; 3 WHARTON, INTERNATIONAL LAW DIGEST, 464–74 (2d ed. 1887); HALL, *op. cit. supra* note 34, at 223.

[66] See authorities cited note 65 *supra*. *Cf.* Beale, *The Recognition of Cuban Belligerency*, 9 HARV. L. REV. 406, 419 (1896).

[67] See authorities cited note 65 *supra*.

[68] See 2 HACKWORTH, *op. cit. supra* note 34, at 695–99; WILSON, INTERNATIONAL LAW 39 (3d ed. 1939); 3 WHARTON, *op. cit. supra* note 65, at 464–73.

[69] 2 HACKWORTH, *op. cit. supra* note 34, at 622.

[70] 2 MOORE, INTERNATIONAL LAW DIGEST 779 (1906). With respect to the policy of the United States as evidenced by its participation in conventional arrangements, see 2 HACKWORTH, *op. cit. supra* note 34, at 646–49. *But see* INTERNATIONAL DECLARATION OF HUMAN RIGHTS, ART. 14, U.N. DOC. A/810; GEN. ASS. OFF. REC., 3D SESS. (I), RES. p. 71 (1948).

[71] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[72] Guaranty Trust Co. v. United States, 304 U.S. 126, 137–38 (1938); *In re* Baiz, 135 U.S. 403 (1890); Williams v. Suffolk Ins. Co., 38 U.S. (13 Peters) 415, 420 (1839); *cf.*

> The facts concerning the seizure of the Portuguese ship Santa Maria are not entirely clear. Information available to the Department is conflicting and not sufficiently detailed to form the basis of a firm opinion as to whether the crime of piracy under international law has been committed. There are grounds for suspicion of piracy. This together with the request of the Portuguese Government for assistance are considered to afford ample basis for the action now being taken by the United States naval authorities to ascertain the whereabouts of the Santa Maria and to make an appropriate investigation.[76]

Insurgent Status: Distinctions and Recognition

Insurgency may be defined as the sum total of rights and privileges that foreign states concede to the rebellious party during a civil war.[77] An insurgent seeks a public end, such as reform or change of government, but his revolt need not reach the same proportions as those of organized revolutionary government, which is unrecognized belligerency.[78] Insurgency is not a well-defined status and does not give rise to fixed international rights and obligations,[79] but it is a given margin of tolerance or acquiescence wherein a certain amount of interference with the rights of foreign states may occur.[80] Insurgency is not a crime under international law.[81] Belligerency, however, involves the equivalent of civil war between a recognized government and a *de facto* independent power that maintains occupation

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Ex parte Hitz, 111 U.S. 766 (1884); The Rogdai, 278 Fed. 294, 296 (N.D. Cal. 1920); see Dickinson, *The Unrecognized Government or State in English and American Law,* 22 Mich. L. Rev. 37–39 (1923); Beale, *supra* note 66, at 411.

[73] See authorities cited note 72 *supra.*

[74] See authorities cited note 68 *supra.*

[75] 1 Hyde, *op. cit. supra* note 34, at 202–03; see Wilson, *op. cit. supra* note 68, at 40–45; Beale, *supra* note 66, at 411.

[76] U.S. State Dep't Press Release, N.Y. Times, Jan. 26, 1961, p. 1, cols. 2 & 3. "Subsequent information did not indicate that piracy had been committed." Letter from R. T. Yingling, Assistant Legal Advisor, United States Department of State, to the author, dated March 8, 1961.

[77] Lauterpacht, Recognition in International Law, 270–74 (1947); Wilson, *op. cit. supra* note 68, 38–45.

[78] 3 Webster's New International Dictionary 1289 (2d ed. 1955).

[79] Lauterpacht, *op. cit. supra* note 77, at 270–74.

[80] *Ibid.*

[81] *Cf.* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 642 (1818); see Wilson, *Insurgency and International Maritime Law,* 1 Am. J. Int'l. L. 46, 59 (1907).

and administration of a substantial part of national territory.[82] The more definable status of a belligerent as well as the greater rights and duties attaching to belligerency, are pointed out by the court in *The Three Friends*.[83] The Court said:

> [T]he recognition of a belligerency, while not conferring all the rights of an independent state, concedes to the Government recognized the rights, and imposes upon it the obligations, of an independent state in matters relating to the war being waged. . . . [T]he recognition of belligerency involves the rights of blockade, visitation, search and seizure of contraband articles on the high seas and abandonment of claims [against the parent state] for reparation on account of damages suffered by our citizens from the prevalence of warfare.[84]

An admission by an outside nation of insurgency does not strengthen the legal position of the actors nor does it necessarily manifest a design to aid their cause. Neither does it impose upon the outside state[85] the technical burdens of a neutral.[86] However, once an outside nation determines that an insurgency exists, it must treat the actors accordingly.[87] Admission of insurgency implies that within a state's jurisdiction armed hostilities are temporarily beyond civil control,[88] but such admission makes no intimation as to the merits of the cause.[89] The recognition of belligerent or insurgent status may be express or merely implied by the acts of the outside nation. Therefore, although Brazil did not explicitly take a position on the legal status of either the Santa Maria or its captors, considerable weight should be given to the argument that, by its grant of political asylum and its negotiations and temporary agreements with the rebels, it thereby tacitly recognized their belligerency.[90] But the argument is weakened by the fact that an actual war of serious magnitude did not exist.[91] Hence, the conclusion that Galvão was a belligerent may be unrealistic. In any event, the requirements of a state of insurgency have been met. Recognition as insurgents does not protect the actors from being treated as traitors or pirates by their parent nation,[92] but it does protect them from characterization and treatment as pirates under international law.[93] The fact that the acts were committed on the high seas does not change their essential character from treason under domestic law to piracy under the law of nations.

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[82] 2 OPPENHEIM, INTERNATIONAL LAW 249 (Lauterpacht 7th ed. 1952).

[83] 166 U.S. 1 (1896).

[84] *Id.* at 57, 63; see Beale, *supra* note 66, at 407.

[85] 1 HYDE, INTERNATIONAL LAW, 203 & n. 6 (2d rev. ed. 1947); see LAUTERPACHT, *op. cit. supra* note 77.

[86] 1 HYDE, *op. cit. supra* note 85, at 203 & n. 6.

[87] WILSON, *op. cit. supra* note 68, at 43; *cf.* 2 OPPENHEIM, *op. cit. supra* note 82, at 660; Ford v. Surget, 97 U.S. 594 (1878); Banco De Bilbao v. Sancha, [1938] 2 K.B. 176, 195–96; Luther v. Sagor & Co., [1921] 1 K.B. 456; see also authorities cited note 85 *supra*.

[88] Wilson, *supra* note 81, at 50; see Beale, *supra* note 66, at 407.

[89] See authorities cited notes 77 & 85 *supra; cf.* Beale, *supra* note 66, at 416.

[90] 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW, 320 (1940). *Quaere,* whether Portugal's "actions speak louder than words" in sending reinforcements to her provinces for the express purpose of preventing Galvão from setting up revolutionary government there? It is arguable that Portugal herself thereby recognized the insurgency of Galvão and the movement.

[91] See authorities cited notes 82 & 83 *supra*.

[92] See authorities cited notes 28 & 38 *supra;* Wilson, *supra* note 81, at 54; 3 WHARTON, *op. cit. supra* note 65, at 465 ¶ 3, 467–68, ¶¶ 1 & 3, 469 ¶ 3.

CONCLUSION

When illegal acts of violence, detention or depredation on the high seas by *de facto* political revolutionaries are carefully confined so as to affect seriously only the parent government and its loyal citizens, for purely political ends, such conduct should be neither viewed nor treated by any nation as piracy *jure gentium.* Obviously, neither the according of recognized status nor the actual locus of the act changes its essential character. The predominant purpose and effect of the acts are the paramount considerations. Such individuals could be traitors, murderers, robbers, thieves or even pirates under domestic law,[94] but not pirates under the law of nations.[95] As Hall states:

> It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things, and which may in fact have already succeeded in setting it up, are piratical for want of an external recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a condition of affairs as can only be produced by the very acts in question. It would be absurd to require a claimant to justify his claim by doing acts for which he may be hanged. . . . The man who acts with a public object . . . kept within well-marked bounds . . . is not only not the enemy of the human race, but he is the enemy solely of a particular state.[96]

If the Santa Maria incident were to be viewed out of its context, the acts standing alone could constitute piracy *jure gentium.* But the incident must be viewed in the light of its circumstances. Such circumstances as the acute political unrest upon the Iberian Peninsula (especially in Portugal) and the roles played in it by Galvão, Delgado and Salazar give to this incident an unmistakable character of pure political revolt upon the high seas.

WILLIAM P. WILLIG *

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[93] 1 HYDE, *op. cit. supra* note 85, at 203; Wharton, *supra* note 50, at 131; *cf.* Dickinson, *The Unrecognized Government or State in English and American Law,* 22 MICH. L. REV. 118, 120 (1923); Genet, *The Charge of Piracy in the Spanish Civil War,* 32 AM. J. INT'L L. 253, 258 n. 11 (1938).

[94] See BRIERLY, LAW OF NATIONS 238 (1955); 2 U.N. CONFERENCE ON THE LAW OF SEA, U.N. DOC. A/CONF. 13/L. 58, reprinted in 52 AM. J. INT'L L. 830, 846, 847 (1958); Harvard Research, *Draft Convention on Piracy,* 26 AM. J. INT'L L. SUPP. 739, 744 (arts. 5 & 7) (1932); Dickinson, *Is the Crime of Piracy Obsolete?* 38 HARV. L. REV. 334, 358 (1925); Genet, *The Charge of Piracy in the Spanish Civil War,* 32 AM. J. INT'L L. 253, 254 (1938); HALL, INTERNATIONAL LAW 217 (1880); 3 WHARTON, INTERNATIONAL LAW DIGEST 471–72 (1887).

[95] See authorities cited note 49 *supra.*

[96] HALL, *op. cit. supra* note 94, at 217. See generally 3 WHARTON, *op. cit. supra* note 94, at 471–72.

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RECENT DECISIONS

CONFLICT OF LAWS—WRONGFUL DEATH—LIMITATION OF DAMAGES—*Kilberg v. Northeast Airlines, Inc.,* (New York, 1961)

The public policy of the state of New York embodied in section 16 of article I of the New York constitution, prohibiting a statutory limitation on the amount of damages recoverable for injuries resulting in death, has been stated to be controlling on the question of damage limitation in an action for wrongful death brought in this state under a foreign statute. Therefore, the plaintiff may recover the amount of damages that he is able to prove to have been caused by defendant's negligence, notwithstanding the fact that his cause of action accrued under a foreign statute that limits the amount of damages recoverable for wrongful death. *Kilberg v. Northeast Airlines, Inc.,* 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

The action in the *Kilberg* case was brought by the administrator of the estate of a citizen of New York against defendant airline to recover damages for a death that occurred in Massachusetts. The deceased had purchased a ticket and boarded one of defendant's aircraft in New York. While enroute to its scheduled destination, the aircraft crashed, which resulted in the death of plaintiff's intestate. The Massachusetts wrongful death statute in effect at the time of the injury, section 2 of chapter 29 of the General Laws of Massachusetts, gave a cause of action against a common carrier for negligently causing a passenger's death but limited the damages recoverable to not less than $2,000 nor more than $15,000. The plaintiff pleaded a cause of action to recover damages for wrongful death under the statute and also a cause of action on contract. The allegations of the contract cause of action were that plaintiff's intestate had purchased a ticket from defendant in New York and that defendant had thereby agreed to transport plaintiff's intestate safely to his destination; that defendant had breached the contract to transport plaintiff's intestate safely and that the estate had thereby suffered damage in the amount of $150,000.

On the trial defendant moved to dismiss the contract cause of action for insufficiency. That motion was denied at special term but granted by the appellate division. *Kilberg v. Northeast Airlines, Inc.,* 10 App. Div. 2d 261, 198 N.Y.S.2d 679 (1960). Plaintiff appealed from the dismissal of his cause of action on contract. The court of appeals unanimously affirmed the ruling of the appellate division. The majority stated by way of dictum that if the injuries had not resulted in death, a contract action governed by New York law would have been available. However, the court stated that no separate right to sue the carrier on the contract accrued to plaintiff as administrator and such cause of action did not survive the death of his intestate.

The declaration by the court in the *Kilberg* case concerning plaintiff's right to sue under the Massachusetts statute unrestrained by the limitation on damages is not a holding on an issue before the court, but a statement of the law applicable should plaintiff elect to apply for leave to amend his complaint following the dismissal of his contract action and to pursue his remedy solely under the Massachusetts wrongful death statute. *Wooden v. Western N.Y. & P. R.R.*, 126 N.Y. 10, 26 N.E. 1050 (1891), was cited to indicate that the New York view concerning a restriction on damages pertains to the remedy rather than to the substantive right. The court remarked that remedial and substantive rights shade into each other, and that the decision placing a given right into either category is governed by the law of the forum. Since there are opposite holdings in different states as to whether the measure of damages is to be treated as procedural or substantive, the majority in the principal case concluded that it was open to the court, especially in view of New York's strong public policy, to treat the measure of damages in a wrongful death action as being a matter of procedure. That policy the court found manifested in section 16 of article I of the constitution.

A concurring opinion by Judge Fuld, while noting that the English rule prior to Lord Campbell's Act allowed the administrator or executor a contract cause of action for breach of the implied contract of safe carriage, pointed out that New York had never allowed such a recovery at common law. He then suggested that with the enactment of the New York wrongful death statute, a contract cause of action for damages due to death resulting from a breach of the carrier's agreement might be maintainable if both the agreement had been made and the wrongful act had occurred in New York. Judge Fuld believed that the judgment dismissing the contract cause of action should be affirmed but that the court should not pass upon any further issues.

Judge Froessel, in a separate concurring opinion in which Judge Van Voorhis joined, stated that the consideration by the court of the wrongful death cause of action, which was neither in issue nor argued on the appeal, was an unprecedented exercise of discretion beyond the province of the court. He urged further that if the cause of action accruing under the Massachusetts statute is to be given effect, the New York court must enforce it in its entirety and that the measure of damages is to be treated as a substantive rather than a procedural matter, which should be governed by the law of the place where the wrong occurred. Furthermore, Judge Froessel felt that it might be difficult to reconcile the majority view with the full faith and credit clause of the federal constitution.

At the commencement of this litigation plaintiff had undoubtedly decided that his rights, both as to the accrual of his cause of action and the measure and amount of damages for wrongful death, would be governed by the law of the jurisdiction where the injury occurred. The contract cause of action was probably interposed to circumvent the limitation on damages imposed by the Massachusetts statute. The sustaining of defendant's demurrer to this cause of action by the appellate division and the affirmance of the judgment by the court of appeals would seem to be correct since the action sounds in tort and not in contract. Liability should depend upon proof of defendant's negligence. See *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936); *Webber v. Herkimer*

R.R., 109 N.Y. 311, 16 N.E. 358 (1888). The damages that plaintiff might recover were for the wrongful death of his intestate. Such damages may be recovered only by sustaining the statutory wrongful death action. *Faron v. Eastern Airlines,* 84 N.Y.S.2d 568 (Sup. Ct. 1948).

The most important phase of the *Kilberg* decision is the opinion expressed by the majority of the court concerning plaintiff's right to sue in New York under the Massachusetts statute without limitation as to the damages that he may recover. This dictum, which is contrary to accepted rules of conflict of laws was not within the scope of the issues raised on appeal and consequently unnecessary to the decision. It is difficult to reconcile the position taken by the majority, when the exact nature of the problem concerning the limitation of damages is examined in the light of common law concepts and prior New York decisions.

As the majority opinion indicated, the solution to the problem concerning the law that is to govern the limitation of damages depends upon whether the damages recoverable for the injury are considered to be a matter of primary right or a matter of remedy. The majority of the court chose to treat the measure of damages as procedural or remedial, controlled by the policies of New York. Such a definitive designation of the measure of damages would seem to be undesirable. It is natural to say that damages are the remedy for a wrong that has been committed. The judgment for damages sought by a plaintiff is to remedy his injury in the sense that the object of the judgment is to restore him to his position before the injury. However, there is within the scope of the meaning and use of the term "remedy" the concept of rights of a dual nature. These rights include procedural rights, or the mode of redressing the wrong, and substantive rights or the right to reparation. The primary right of freedom from injury is concededly created by the law of the place where the transaction occurred. In the principal case the right flows from the Massachusetts wrongful death statute. This in turn gives rise to a secondary right or a claim for reparation against the wrongdoer. Such a claim is, in effect, substituted for plaintiff's primary right. His measure of damages or reparation is logically a matter of substantive right to be governed by the law of the place where the injury occurred. Plaintiff's remedy is procedural only in so far as a remedial right is created to enforce his secondary right to reparation. Therefore, only the mode of redressing his wrong is procedural, to be governed by the law of the forum. See Note, 14 *Minn. L. Rev.* 665 (1930).

The United States Supreme Court has expressed a similar view in *Slater v. Mexican Nat'l R.R.,* 194 U.S. 120 (1904). In that case a citizen of Texas was suing in a Texas court to recover for a wrongful death that occurred in Mexico. The Court stated that the right to damages was included in the substantive obligation that accrued under the foreign statute and that the lex loci determined not only the existence of the obligation but also its extent.

The New York decisions prior to the *Kilberg* case also point to the conclusion that the measure or limitation of damages in a death action must be governed by the lex loci. Such a cause of action was unknown to the common law. Following the enactment in England of Lord Campbell's Act, 1846, 8 & 10 Vict. c. 93, the various states enacted similar statutes allowing a cause of action for wrongful death. The New York wrongful death statute was enacted in 1847. N.Y. Sess. Laws 1847, ch. 450. Two years later the statute was amended to limit the amount recoverable to $5,000. N.Y. Sess. Laws 1849, ch. 256. New York continued this limitation until 1895 when the legislature repealed the limitation and the amount of damages recoverable became unlimited by virtue of the state constitution. See *N.Y. Const.* art. I, § 16.

The cases during the interim from 1847 to 1895 involving suits in the New York courts based on foreign death statutes invariably involved the problem of applying the New York limitation when the foreign statute, upon which the cause of action was based, did not limit the recovery. *Wooden v. Western N. Y. & P. R.R.*, 126 N.Y. 10, 26 N.E. 1050 (1891), cited by the majority in *Kilberg* presented such a situation. Plaintiff's husband had been killed in Pennsylvania as a result of the negligence of defendant. Pennsylvania did not limit the amount of damages. The court held that plaintiff's recovery would be limited as provided by the New York statute, even though her cause of action arose under the Pennsylvania statute. The majority in the principal case relied upon this case for its rationale in enforcing the New York limitation because it pertains to the remedy rather than to the substantive right. The court in the *Wooden* case stated that a plaintiff who chose to submit to the remedial procedure of New York must also submit to the New York remedial limitations. In view of the prior discussion concerning the dual nature of the remedial right, it seems difficult to reconcile the reliance placed on the statements in the *Wooden* case. The limitation seems to be not only remedial but substantive. It pertains to the reparation for the injury.

Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918), was referred to by the majority in *Kilberg* as holding that the Massachusetts statute, under which that action was brought, though it provided minimum and maximum limitations, was not therefore penal in nature so as to be unenforceable in New York. It is submitted that the rationale as set forth in the *Loucks* case seems controlling in the principal case and that the Massachusetts statute should be given force and effect in its entirety. In the *Loucks* case, Judge Cardozo, writing for the court, stated the general rule in the United States to be that suits may be brought in any jurisdiction to recover damages for a tort committed in another jurisdiction, unless the public policy of the jurisdiction enforcing the cause of action forbids such relief. He further stated that the principles of the territorial system and the doctrine of vested rights prevail in this country as opposed to the theory of a body of national law that each citizen may carry about with him. Therefore, there seems to be little doubt that in the principal case plaintiff's substantive rights accrued by virtue of the Massachusetts statute. Those rights allowed him to assert the cause of action and also determined the amount of his reparation. In the *Loucks* case, the fact that New York could not give plaintiff the same relief that would have been given if the action had been brought under the New York statute is treated as being settled beyond argument. *Loucks* undoubtedly contemplated enforcement of the Massachusetts statute giving rise to a cause of action that was enforceable in the courts of New York to the extent of reparation that the statute allowed.

As indicated by Judge Froessel's concurring opinion, the constitutionality of the position taken by the *Kilberg* case also seems doubtful. Each state must give full faith and credit to the public acts of every other state. *U.S. Const.* art. IV, § 1. Every court within the United States must follow the same principles of full faith and credit, 28 U.S.C. § 1738 (1958). However, it is a general principle of conflict of laws that a court of one state may refuse to entertain a cause of action created by foreign law, where the enforcement would contravene the fundamental public policy of the forum. This does not mean that the rights of the parties in the principal case as established by the Massachusetts statute may be granted or withheld at the pleasure of the New York court to accommodate notions of expediency and fairness. See *Loucks v. Standard Oil Co.,* 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918).

The majority in *Kilberg* decided to enforce the obligation that depends upon the foreign statute. The wrongful death cause of action should be accorded full faith and credit since it is not in violation of fundamental principles of justice as determined by the laws of New York. The majority, however, went further and enforced the obligation not only as it was created in Massachusetts but as if it were enforcing the obligation under the New York statute. The reason given is the public policy of this state. This treatment of the cause of action, conforming it to New York law, is also predicated on *Wooden,* which now seems to be contrary to the rule of *Hughes v. Fetter,* 341 U.S. 609 (1951). In the *Hughes* case plaintiff asserted a cause of action in Wisconsin under the Illinois wrongful death statute. The death occurred in Illinois. The Wisconsin wrongful death statute created a right of action only for deaths which occurred in that state. Although the Wisconsin Supreme Court had stated that enforcement of the Illinois statute was contrary to local public policy, the Supreme Court of the United States held that Wisconsin may not refuse to enforce the Illinois statute. It may be possible to reconcile the principal case with *Hughes* on the ground that *Kilberg* recognized the foreign cause of action, as opposed to the *Hughes* case, in which a state court attempted to abrogate a substantive right created by the statute of a sister state.

The results attained by the *Kilberg* decision have some merit in the light of modern means of travel and the consequent frequent movement from one state to another. The disadvantages, however, would seem to far outweigh the advantages. As a matter of policy the amount of damages should not be made dependent upon plaintiff's choice of forum, nor should a defendant be subjected to varying limits of damages for injuries arising out of the same transaction. According to logic and principle, the reparation to be afforded should depend upon the law of the jurisdiction giving rise to the obligation.

C. E. C., Jr.

CONSTITUTIONAL LAW—SEPARATION OF CHURCH AND STATE—FEDERAL AND N. Y. CONSTITUTIONS DO NOT PROHIBIT NONCOMPULSORY DAILY RECITATION OF PRAYER IN PUBLIC SCHOOLS—*Engel v. Vitale*, (New York, 1960)

The voluntary recitation of a nondenominational prayer at the beginning of each school day as a matter of daily practice in a public school is not prohibited by either the federal or New York constitutions. *Engel v. Vitale,* 11 App. Div. 2d 340, 206 N.Y.S.2d 183 (1960).

The petitioners, taxpayers and parents of public school children, brought a proceeding under article 78 of the Civil Practice Act, seeking an order in the nature of mandamus directing the respondent board of education to discontinue the use of the "Regents' prayer" in its school district. In 1951, the board of regents of the state of New York adopted the prayer in question and recommended that it be recited at the commencement of each school day following the pledge of allegiance to the flag. In 1958, the respondent approved a resolution authorizing the use of the prayer in its district. The text of the prayer, which is composed of twenty-two words and which the average student might recite in approximately twelve seconds, is as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers, and our country." Sixteen taxpayers and parents were permitted to intervene as respondents and the state board of regents filed a brief amicus curiae.

The justice at special term held that there was no triable issue of fact and dismissed the petition. The controversy was remanded to the board of education which was directed to adopt certain safeguards to insure that the recital of the prayer was voluntary, to be observed or not at the election of the child or his parent. *Engel v. Vitale,* 18 Misc. 2d 659, 191 N.Y.S.2d 453 (Sup. Ct. 1959). The board subsequently notified all parents in the district that they might have their children excused from joining in the prayer or from remaining in the classroom while it was being recited. In spite of such action the petitioners appealed from the order granted at special term in so far as it denied their petition. The appellate division, in a per curiam opinion, agreed with the views expressed by the justice at special term and affirmed the order upon his opinion.

Several issues were presented for determination in the trial court. The petitioner alleged that the manner in which the prayer was said was contrary to the religious practices of those petitioners who were theists and contrary to the beliefs concerning religion of those petitioners who were atheists. In answer to this contention, the respondent emphasized that no child had been coerced or persuaded to participate in the prayer. The petitioner thereupon asserted that the institution of the prayer in the public school system, even without any formal coercion by the school authorities, was a violation of the first and fourteenth amendments of the federal constitution and an infringement of article I, section 3 of the New York constitution.

The manner in which these constitutional limitations affect the actions of local school boards has been considered on various occasions by the Supreme Court of the United States and the courts of New York. In *Zorach v. Clauson,* 303 N.Y. 161, 100 N.E.2d 463, *aff'd,* 343 U.S. 306 (1952), a provision of the Education Law that permitted New York City public schools to release students during school hours on the written request of their parents, so that they might leave the school to attend religious instructions, was upheld as a proper exercise of legislative power. The Supreme Court stated that by this system New York had neither prohibited the free exercise of religion nor made a law respecting the establishment of religion within the meaning of the first amendment. The program was completely voluntary, and public facilities were not used in its operation. This last point distinguishes *Zorach* from the earlier Supreme Court decision in *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203 (1948). In that case, the Court held unconstitutional a released time program that made school buildings available for religious instruction since it could be shown that tax-supported property was being used directly for religious purposes.

Where it can be shown that public funds are not being used for any obviously unconstitutional purpose, and where personal freedoms are not being encroached upon, the Court is likely to uphold legislation attacked under the provisions of the first amendment. In *Everson v. Board of Education,* 330 U.S. 1 (1946), a taxpayer contended that the New Jersey legislature was without power to authorize reimbursement of bus fares to parents of children attending Roman Catholic parochial schools. The petitioner, relying on the first amendment, contended that since the Catholic schools taught religion the bus fares were being used to support this faith. This contention was rejected on the ground that the reimbursement was public welfare legislation, designed to promote safe transportation of children to and from school, and that the state cannot fairly deprive individuals of the benefits of such legislation merely because of their faith or lack of it.

These decisions, based upon the federal constitution, are now clearly binding upon the states. Prior to the adoption of the fourteenth amendment, the first amendment did not apply as a restraint upon the states. As the Court pointed out in *Everson,* the first amendment was made applicable to the states by the fourteenth amendment, which now commands, in effect, that "a state shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Everson v. Board of Education, supra* at 8. Therefore the issue before the court in the principal case was whether the "Regents' prayer" constituted the establishment of religion or prohibited the free exercise of religion.

In construing the amendments to the federal constitution, one must examine the history and circumstances surrounding the adoption of the provision in question. *Ex parte Bain,* 121 U.S. 1 (1886). In 1868, when the fourteenth amendment was ratified, the separation of public education from church entanglements and of the state from the teaching of religion was firmly established in the consciousness of the nation. Nevertheless, at that time it was equally clear that such separation did not require the exclusion of prayers or the reading of the Bible from the public school routine. Before and after that time, New York school programs included both these exercises. Considering these facts, the special term reached the conclusion that the recognition of prayer was an integral part of our national heritage and that the establishment clause could not have been intended to outlaw such practices. The petitioners objected to the manner in which the prayer was said on the ground that the rights of nonbelievers and the religious scruples of all believers were not protected. As a defense, the board of education and the intervenors set up the right of children other than those of the petitioners to say the prayer free from interference and the right of parents to insist that their children should not be forcibly subjected to an atmosphere of complete and uncompromising secularism.

The petitioners' argument was based on the theory that because of the surroundings and uniform participation in the prayer, those who refrained from reciting it were designated as dissenters and that a certain element of divisiveness arose. The effect of such an atmosphere, coupled with the authoritative power of the schools, allegedly produced a psychological effect that subtly compelled participation. The New York Court of Appeals considered and rejected a similar argument in the *Zorach* case. In his concurring opinion in that case, Judge Desmond declared that the characterization of such programs as "divisive" or "oppressive" or "coercive" was meaningless on a question of constitutional law. 303 N.Y. at 177, 100 N.E.2d at 471.

In the *McCollum* case, the Illinois released-time program was likewise alleged to bring conformist pressure upon nonparticipating students. In that case the program was held unconstitutional for other reasons. The divisiveness argument was considered and rejected in a concurring opinion on the ground that the complainant's child was free to join religious classes or not without any penalty being attached to either choice. Although a particular pupil might be singled out as a dissenter and thereby humiliated, ". . . it may be doubted whether the Constitution, which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity. . . ." Jackson, J., concurring in *Illinois ex rel. McCollum v. Board of Education, supra* at 233.

This lack of compulsion distinguishes these cases from such decisions as *State Board of Education v. Barnett,* 319 U.S. 624 (1942), where a state law requiring public school children to salute the flag was declared unconstitutional under the first and fourteenth amendments. The Court in that case so held because of the fact that nonparticipation was punished by expulsion and no consideration was given to the students' religious convictions.

The Supreme Court has been presented with analogous situations in cases relating to Bible reading in the schools, but it has not rendered decisions on the merits. In *Doremus v. Board of Education,* 5 N.J. 435, 75 A.2d 880, *appeal dismissed,* 342 U.S. 429 (1952), the New Jersey court upheld a state statute providing for voluntary participation in a public school program that consisted of the daily reading of five verses from the

Old Testament and permitted group recitation of the Lord's Prayer. Since the complainant's child had graduated from the school by the time the case reached the Supreme Court, the Court dismissed the petition because the question was moot. In *Schempp v. School Dist. of Abbington Township,* 177 F. Supp. 398 (E.D. Pa. 1959), a three-judge federal court struck down a Pennsylvania statute that compelled student participation in the daily reading of the Old and New Testaments. Later that year, the Pennsylvania legislature passed a statute providing that any child could be excused from attending these exercises. In view of this new provision, the Supreme Court remanded the case to the district court for such further proceedings as might be appropriate. *School District of Abbington Township v. Schempp,* 364 U.S. 298 (1960).

A related question was considered in *Lewis v. Allen,* 5 Misc. 2d 68, 159 N.Y.S.2d 807 (Sup. Ct. 1957). The petition in that case requested the commissioner of education to revoke a regulation requiring the use of the phrase "under God" in the pledge of allegiance to the flag. Special term upheld the regulation since it could find no compulsory language in the provision.

In the principal case, the appellate division upheld the prayer on the theory that public recognition of the Almighty, where it is not mandatory, is traditionally permissible under the relevant constitutional provisions. The decision was not unanimous. One member of the court, while concurring in the result, objected to the court's holding that such cooperation between church and state was traditionally acceptable and voted for affirmance on the ground that the prayer itself did not constitute religious teaching. 11 App. Div. 2d at 341, 206 N.Y.S.2d at 185.

The legislature has delegated to the regents the duty "to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship. . . ." N.Y. Educ. Law § 801. The court in *Engel v. Vitale* has affirmatively recognized that the prayer in question in that case, with its recognition of God, is a constitutionally proper instrument for fostering these qualities.

E. J. T.

CRIMINAL LAW—DUE PROCESS—RIGHT TO A SPEEDY TRIAL—*People v. Wilson,* (New York, 1960)

The New York Court of Appeals decided, in the case of *People v. Wilson,* 8 N.Y.2d 391, 169 N.E.2d 440, 208 N.Y.S.2d 963 (1960), that after dismissal of an indictment for want of a speedy trial, reindictment for the same crime after extreme delay results in a denial of due process of law guaranteed by the fourteenth amendment.

In January, 1955, the defendant was indicted for several felonies allegedly committed in June, 1954. He was arraigned in October, 1956, at which time he moved to have the indictment dismissed in accordance with section 668 of the New York Code of Criminal Procedure. That section provides that if a defendant, indicted for a crime whose trial has not been postponed upon his application, is not tried at the next term of court in which the indictment is triable, and good cause therefor not shown, the court may dismiss the indictment. Defendant's motion was denied by the trial court, but that determination was reversed on appeal and the indictment was dismissed. *People v. Wilson,* 5 App. Div. 2d 690, 169 N.Y.S.2d 285 (1957). In November of 1958, more than three years after the defendant had first moved for dismissal, he was reindicted for the same crime. Defendant's motion to dismiss the new indictment was denied; he pleaded guilty and received the same sentence imposed in 1956. *People v. Wilson,* 15 Misc.2d 858, 182 N.Y.S.2d 842 (1959), *aff'd,* 10 App. Div. 2d 297, 205 N.Y.S.2d 353 (1960).

In deciding whether Wilson had been denied due process of law under the fourteenth amendment, the court was confronted with a unique and perplexing situation. The prosecution, commenced four years and seven months after the crime was allegedly committed, was within the statutory limitation for the prosecution of felonies. N.Y. CODE CRIM. PROC. § 142. Further, the Code expressly provides that a dismissal of an indictment for want of a speedy trial is not a bar to a subsequent prosecution if the offense charged be a felony. N.Y. CODE CRIM. PROC. § 673. These sections of the Code seemed to justify the determination of the lower courts. However, it is a fundamental principle that a defendant in a criminal prosecution is entitled to a speedy trial. N.Y. CODE CRIM. PROC. § 8; N.Y. CIV. RIGHTS LAW § 12.

Chief Judge Desmond, writing for the majority of the court of appeals, observed that although sections 142 and 673 of the Criminal Code seemed to warrant Wilson's conviction, such a result would infringe upon the defendant's right to a speedy trial. *People v. Prosser,* 309 N.Y. 353, 130 N.E.2d 891 (1955).

In the *Prosser* case the defendant was indicted for five crimes. At the trial he pleaded guilty to two indictments and was sentenced as a fourth-felony offender. The district attorney failed to prosecute the defendant under the remaining three indictments due to the severity of the sentence. Six years later it was determined that the defendant was erroneously sentenced and that he was not a fourth-felony offender. At that time the district attorney rearraigned him on one of the indictments to which he had pleaded guilty six years before. The court, in deciding that the defendant could not be prosecuted, held that the burden of proceeding promptly was upon the state, not the defendant. The basis for the holding was that the defendant was guaranteed freedom from undue delay between the time of the indictment and the time of trial regardless of his guilt or innocence and that enforcement of that right was provided for by the Criminal Code. N.Y. CODE CRIM. PROC. § 668. The justification for such delay must be shown by the prosecution which, in the *Prosser* case, failed to show the slightest good cause for delay.

In the principal case, the majority concluded that strict adherence to sections 142 and 673 of the Criminal Code would pervert the spirit of the decision announced in the *Prosser* case and would be contrary to the fundamental right of a speedy trial guaranteed by the Criminal Code and the Civil Rights Law. The court asserted that although there would certainly be instances where reindictment under section 673 would be proper, such a case was not presented where, as in *Prosser,* the delay was extreme and unjustified. Wilson, therefore, should not suffer prosecution under the reindictment. The rationale of the court was that such a rule would charge law enforcement officers with a duty to proceed to trial without delay and the fact that on occasion one guilty of crime might go unpunished was incidental to the issue.

The dissenting judges stated that the right to a speedy trial was not conferred by the New York Constitution on a defendant under criminal prosecution. Nor was the provision for a speedy trial in the sixth amendment of the United States Constitution such a fundamental right as to be included in the fourteenth amendment. *Wolf v. Colorado,* 338 U.S. 25 (1949); *Snyder v. Massachusetts,* 291 U.S. 97 (1934); *People v. Jelke,* 284 App. Div. 211, 130 N.Y.S.2d 662 (1954), *aff'd,* 308 N.Y. 56, 123 N.E.2d 769 (1954). The dissenting judges thought that the statutory conferral of the right to a speedy trial was not an absolute guarantee but was qualified by sections 142 and 673 of the Criminal Code; section 673 of the Code authorizes reindictment where the crime alleged is a felony, and section 142 limits the time for the prosecution thereof.

The dissenting opinion distinguished *People v. Prosser, supra,* from the principal case in that the former involved dismissal of an indictment for delay and immunity from further prosecution because the statute of limitations had run. The holding in that case was simply to the effect that an indictment followed by undue delay until trial should be dismissed. Once the indictment had been dismissed, the statute of limitations, not the want of a speedy trial, barred further prosecution. In the principal case, prosecution after dismissal of an indictment should not have been barred since the limitation period had not run. In the view of the minority, the effect of the decision in *Wilson* was to create a new limitation period for the prosecution of felonies after the dismissal of an indictment under section 668. Reindictment under section 673 of the Code would no longer be governed by section 142 but would be a matter of discretion for the courts at least within the limitation period. It was further pointed out that if the criteria for reindictment were to be regarded as no longer statutory but, rather, as discretionary, then the appellate division exercised its discretion by affirming the county court's decision, and the only basis for reversal of that determination would be a finding, as a matter of law, that the appellate division abused its discretion. Since there was no such finding, the dissenting judges said, the court of appeals should affirm.

Several states maintain statutory schemes very similar to that of New York. In California, Montana, and Oklahoma, the statutes provide that an indictment *must* be dismissed where good cause to the contrary is not shown and where a defendant has not been brought to trial within a specified time after the finding thereof, but such a dismissal is not a bar to any other prosecution for the same offense where the offense charged is a felony. CAL. PENAL CODE ANN. §§ 1382, 1387; REV. CODE OF MONT. §§ 94–9501, 94–9507 (1947); OKLA. STAT. ANN. §§ 812, 817 (1951). The statutes in Arizona and Washington are substantially the same except they provide that an indictment *shall* be dismissed where a defendant has not been brought to trial within a specified time after the indictment has been found. ARIZ. R. CRIM. P. 236, 238; REV. CODE OF WASH. §§ 10.37.015, 10.43.010 (1951).

The defendant, in the principal case, noted that the statutes referred to above and New York's section 668 differ in that the former direct that courts *shall* or *must* dismiss an indictment while the latter provides that the courts *may* dismiss the indictment. Defendant argued that New York's statute was discretionary while the others were mandatory, hence that in those states reindictment is required after dismissal. Certainly the statutory use of the words *must* and *shall* are indicative of the courts' mandatory duty to dismiss an indictment. As a general proposition *must* and *shall* are construed as words of command. *In re Boulevard Theatre & Realty Co.,* 195 App. Div. 518, 186 N.Y. Supp. 430 (1921), *aff'd,* 231 N.Y. 615, 132 N.E. 910 (1921); *Rosenblum v. Gorman,* 21 App. Div. 618, 47 N.Y. Supp. 754 (1897); 1 *McKinney, Consol. Laws Ann., Statutes* § 177. However, it does not necessarily follow that the word *may* gives the courts a discretionary power. Although *may* connotes discretion, it must be read in context and when so done it has sometimes been construed as mandatory. *People ex rel. Doscher v. Sisson,* 222 N.Y. 387, 118 N.E. 789 (1918); *People v. DeRenna,* 166 Misc. 582, 2 N.Y.S.2d 694 (1938); *People ex rel. Bloy v. Walker,* 113 Misc. 592, 184 N.Y. Supp. 879 (1920); 1 *McKinney, Consol. Laws Ann., Statutes* § 177.

It is submitted that if the right to a speedy trial is a fundamental right, as argued by the defendant and found by the court, then where an indictment is not brought to trial at the next term of court in which it is triable and good cause therefor is not shown, the court *must* grant dismissal upon defendant's application in order to protect that right. N.Y. CODE CRIM. PROC. § 668. The general rule is that permissive words used in statutes that confer power and authority on public officers or bodies will be held to be mandatory where the act authorized to be done concerns the rights of individuals. *People ex rel. Doscher v. Sisson,* 222 N.Y. at 395, 118 N.E. at 791 (dictum).

Assuming that New York's statutory scheme is substantially the same as those of the states alluded to, an examination of the line of decisions in those states will be helpful. In each of those states the courts have applied the statutes literally, holding that a subsequent indictment after dismissal for delay in trial was proper. See *Ex parte Butts,* 19 Ariz. 318, 170 Pac. 792 (1918); *In re Begerow,* 136 Cal. 293, 68 Pac. 773 (1902); *State v. McGowan,* 113 Mont. 591, 131 P.2d 262 (1942); *Ex parte Warrenburg,* 63 Okla. Crim. 125, 73 P.2d 476 (1937); *State v. Deloria,* 129 Wash. 497, 225 Pac. 405 (1924); *State ex rel. Repath v. Caldwell,* 49 Wash. 336, 37 Pac. 669 (1894).

In *Ex parte Butts,* 19 Ariz. 318, 170 Pac. 792 (1918), Ethel Butts was arrested to answer a charge for murder. The prosecution failed to file an information for thirty-one days, the statutory time for filing an information or bringing an indictment to trial being thirty days. Upon defendant's motion the prosecution was dismissed and immediately thereafter she was arrested and charged with the same offense. In refusing a writ of habeas corpus, the court held that by express statutory provision dismissal of an action for failure to return an indictment or information is not a bar to a subsequent prosecution for the same offense where the offense charged was a felony. The court concluded that it did not matter when the subsequent prosecution was commenced since the statute provided a clear guide, so plain that any attempt to argue or interpret it would be futile.

The case of *State v. Deloria,* 129 Wash. 497, 225 Pac. 405 (1924), suggested disturbing possibilities of danger in application of statutes providing for reindictment after dismissal for delay in trial. Defendant Deloria was arrested and charged with bigamy but was discharged shortly thereafter because the prosecuting attorney believed that the county court lacked jurisdiction. Defendant was later arrested for the same offense in another county; however, that prosecution was dismissed for failure to proceed to trial within the time prescribed by statute. Upon a subsequent information for the same offense, defendant objected because it allegedly violated his right to a speedy trial. Defendant argued that if a second information could be filed, so could a third and a fourth and so on indefinitely, so that a defendant could be held without trial. The court held that upon the facts stated the defendant was not entitled to be discharged. The duty of the court is to see that a defendant is fairly treated. The court concluded that if it appeared that the prosecution was abusing its power in the manner anticipated by the defendant, it would be within the power of the court to dismiss an information; however, the statute providing for subsequent prosecution was clear, and in the absence of such abuse the subsequent prosecution of the defendant was proper.

The majority of the court of appeals in the principal case seemed to object to the undue delay between the dismissal of the first indictment and the subsequent indictment. As stated in *Ex parte Butts, supra,* it matters not when the subsequent prosecution is commenced in the face of a mandatory statutory provision. The statute of limitations governs the time in which a defendant may be prosecuted, while the guarantee of a speedy trial is designed mainly to prevent undue delay *between the time of indictment and trial. People v. Prosser,* 309 N.Y. 353, 356, 130 N.E.2d 891, 893 (1955). It is submitted that the test as to the permissibility of reindictment, under the *Wilson* rule, lies within the sound discretion of the trial courts. It is for them to determine whether there has been an unconscionable delay in granting a defendant a speedy trial. Until the *Wilson* rule has been applied in a number of cases, the latitude of the court's discretion in this matter will remain somewhat uncertain.

D. B. C. III

NEGLIGENCE—RES IPSA LOQUITUR—MULTIPLE DEFENDANTS—*Dement v. Olin-Mathieson Chemical Corp.*, (Texas, 1960)

In *Dement v. Olin-Mathieson Chem. Corp.*, 282 F.2d 76 (5th Cir. 1960), the court reversed a judgment for defendant manufacturers in an action by a driller's helper against three separate component manufacturers of an explosive charge that exploded prematurely injuring plaintiff. The court held that it was error not to instruct the jury on the doctrine of res ipsa loquitur notwithstanding the fact that plaintiff was unable to show the actual cause of the explosion or to single out which of three manufacturers of the components of the charge was guilty of negligent manufacture.

Plaintiff, a driller's helper, was assisting a co-worker in drilling holes and preparing explosive charges for seismographic exploration. The charge was composed of sticks of gelatin dynamite manufactured by Atlas Powder Company (hereinafter called Atlas), a metal cylinder booster manufactured by E. I. du Pont de Nemours and Company (hereinafter called du Pont), and an electrical blasting cap manufactured by Olin-Mathieson Chemical Corporation (hereinafter called Olin). All three components contained high explosives and were connected together to make up the seismograph charge. At the time of the premature explosion, the plaintiff's co-worker was assembling the charge and the plaintiff was approximately eighteen feet away. When the explosion occurred, the driller was instantly killed and the plaintiff was injured severely. The plaintiff sued the separate manufacturers; his expert witnesses advanced several theories as to the probable cause of the explosion but none indicated any defect in the booster manufactured by du Pont. Finding nothing in the record to implicate du Pont, the court in the instant case affirmed the trial court's judgment exonerating du Pont but reversed its judgment as to defendants Olin and Atlas on the ground that the district court judge's charge to the jury erroneously excluded instructions on res ipsa loquitur.

Although an accident may be established as a type that does not ordinarily happen unless someone is negligent, it is still generally accepted that some sort of control over the instrumentality causing the injury must be attributable to the defendant. Serious difficulties are raised by the precise meaning of the term "control." In Texas it is the prevailing view that under the doctrine of res ipsa loquitur the instrumentality causing the injury must have been within the physical control of the defendant at the time of the negligent act. *Ozark v. Wichita Manor, Inc.*, 252 F.2d 671 (5th Cir. 1958); *Honea v. Coca-Cola Bottling Co.*, 143 Tex. 672, 183 S.W.2d 968, 970 (1944); *cf. Haas v. Carrier Corp.*, 339 S.W.2d 727 (Tex. Civ. App. 1960). The record must also show by a preponderance of the evidence that nothing intervened that would have substantially altered the instrumentality after it passed from the control of the person sought to be held liable. *Benkendorfer v. Garrett*, 143 S.W.2d 1020, 1022 (Tex. Civ. App. 1940).

Since the defendants, in the principal case, had neither actual control of the dynamite charge nor the right to control the charge at the time of the explosion, it was necessary for the plaintiff to go further with his proof in order to establish by a preponderance of the evidence that the defendants' negligence caused the injury. The United States Court of Appeals, in the principal case, found sufficient evidence to establish the absence of other causal factors that might have operated to alter the dynamite charge after it had passed from the control of the defendants. The court concluded that if the evidence adequately demonstrated that the explosive charge was not altered by any parties who dealt with the instrumentality after the defendants, then plaintiff was entitled to have this factual issue determined by the jury. See *Rogers v. Coca-Cola Bottling Co.*, 156 S.W.2d 325, 326 (Tex. Civ. App. 1941). However, this necessary evidence is not found in the facts reported in the decision.

Some products liability cases have pointed to the absence of exclusive control by defendant at the time of the accident in denying the applicability of res ipsa. *Patrol Valve Co. v. Farrell,* 316 S.W.2d 92 (Tex. Civ. App. 1958) (explosion of hot water heater); *Kimmey v. General Motors Corp.,* 262 S.W.2d 530 (Tex. Civ. App. 1953) (destruction by fire of plaintiff's car one day after purchase); *Matievitch v. Hercules Powder Co.,* 3 Utah 2d 283, 282 P.2d 1044 (1955) (explosion of dynamite while being placed in drill hole). It should be noted that the apparent inconsistency in the Texas view of control in the above cases may be explained on the ground that plaintiff did not account for the product's history after it left defendant's possession. The case of *Koktavy v. United Fireworks Mfg. Co.,* 160 Ohio St. 461, 117 N.E.2d 16 (1954), recognized the trend evidenced by the principal case that requires only constructive control; *i.e.,* control at the time of the negligent act rather than at the time of the accident. However, that case applied a much stricter rule of evidence regarding the history of the instrumentality after it left the control of the defendant. Although the plaintiff in the *Koktavy* case exonerated himself from negligence in the the handling of fireworks, the court said plaintiff failed to account for the handling of the fireworks while they were in the possession of the jobber from whom he had purchased them. A more strict view of control may be found in *Krupar v. Procter & Gamble Co.,* 160 Ohio St. 489, 117 N.E.2d 7 (1954). It would seem that the more desirable and less harsh rule is found in the instant case and its supporting authorities.

The usual res ipsa loquitur requirement of "control" does not necessarily preclude application of the doctrine where multiple defendants are involved. It should be noted, however, that in order to rely on the doctrine the plaintiff must show a duty owed to him by each defendant. If the plaintiff can show that all defendants were in concurrent or sequential control he may invoke res ipsa against all. *Schroeder v. City & County Sav. Bank of Albany,* 293 N.Y. 370, 57 N.E.2d 57 (1944). Similarly, if he can prove that only one of two or more persons in successive independent control of the instrumentality could have been responsible for the injury, he may invoke the doctrine against that person. See, *e.g., Zimmerman v. Franzen,* 121 Colo. 574, 220 P.2d 344 (1950); *Estes v. Estes,* 127 S.W.2d 78 (Mo. App. 1939). The instant case raises an issue whether plaintiff may rely on res ipsa against component manufacturers having successive independent control of the instrumentality without identifying the negligent act alleged to have caused a premature explosion. There was no dispute in the principal decision that the instrumentality was under the control of the defendants. Since Atlas manufactured the dynamite for Olin, and Olin manufactured the blasting cap and sold the combination under its trademark, obviously both defendants had possession and control of their respective components. If either component part was defective, Olin would be implicated since it had possession of the whole explosive charge before shipment. Therefore, it was possible sufficiently to identify the product with each defendant.

Although a finding that the defendant had either superior knowledge as to what occurred or the opportunity to obtain it, together with his original control of the causes of the accident, is not an essential element in a res ipsa case, courts have frequently justified the application of res ipsa on this basis. *Carothers v. Olsham,* 198 S.W.2d 941 (Tex. Civ. App. 1946); See Prosser, *Res Ipsa Loquitur in California,* 37 CALIF. L. REV. 183, 222 (1949). Whether the availability of evidence to the defendant is to be considered in the application of res ipsa seems to depend upon the procedural effect that the doctrine has upon the burden of proof. In Texas, the doctrine gives rise to a "permissible" inference of negligence which the trier of fact is entitled to accept or reject even though defendant introduces no evidence in rebuttal. *Rogers v. Coca-Cola Bottling Co., supra.* The effect of the doctrine is not to shift the burden of proof to the defendant, but only the burden of going forward with the evidence. *Wichita Falls Traction Co. v. Elliott,* 125 Tex. 248, 81 S.W.2d 659 (1935).

A plaintiff relying on this rule in New York must prove that the injury-producing agency was within the "exclusive" control and possession of the person charged with negligence at the time of the accident. *Paolantonio v. Long Island R.R.,* 300 N.Y. 640, 90 N.E.2d 495 (1950); *Mercatante v. City of New York,* 286 App. Div. 265, 142 N.Y.S.2d 473 (1955). Recently, in *Enslein v. Hudson & Manhattan R.R.,* 6 N.Y.2d 723, 158 N.E. 2d 504, 185 N.Y.S.2d 810 (1959), the court of appeals affirmed a charge of res ipsa although plaintiff offered no proof as to the cause of an accident where both defendants had the right to exclusive control of an escalator. It would seem, however, that New York would not permit a charge of res ipsa under the circumstances of the principal case because of the court's reluctance to liberalize the present necessary element of control.

When the doctrine of res ipsa loquitur is used against two component manufacturers, as in the principal case, only one of whom may have been connected with the cause of the injury, a defendant who is not associated with the instrumentality producing the wrong cannot be presumed to have knowledge of the occurrence superior to the plaintiff. On the other hand, to hold the defendant to strict accountability does not destroy the rationale behind the requirement of a special duty owing from the defendant to the plaintiff where the facts clearly show that the relationship between plaintiff and the defendants is significant enough to warrant the finding of such a duty and to require each defendant to offer an explanation. This does not mean that the holding in the instant case would produce the undesirable effect of strict liability in a negligence action. Sufficient affirmative proof that defendants had exercised all care reasonably possible in the manner in which they manufactured and inspected the component parts would permit a rejection by the jury of an inference of negligence.

D. T.

REAL PROPERTY TAXATION—EXEMPTIONS—RELIGIOUS MEMBERSHIP CORPORATIONS—*People ex rel. Watchtower Bible & Tract Soc'y, Inc. v. Haring,* (New York, 1960)

In *People ex rel. Watchtower Bible & Tract Soc'y, Inc. v. Haring,* 8 N.Y.2d 350, 170 N.E.2d 677, 207 N.Y.S.2d 673 (1960), the court of appeals, two judges dissenting, held that farm property of a membership corporation organized for general religious purposes was exempt from realty taxes under former section 4(6) of the New York Tax Law (carried forward into Real Property Tax Law § 420) where the major portion of produce grown upon such land was used to feed members of the Society working in the corporation's printing plant located over 200 miles away.

The Society is the governing body in the United States of the religious group known as Jehovah's Witnesses. It was organized in 1909 as a membership corporation for general religious purposes, and its headquarters in Brooklyn has since been conducted as a religious community. There the Society owns, maintains and operates an extensive printing and publishing plant. The work is carried on by approximately 500 members who are provided with food, clothing, lodging and in some cases a small monthly cash allowance. The group realizes a small profit from the sale and distribution of books, Bibles, and other literature published by the Society, and their evangelization is done after normal working hours and on weekends.

More than 200 miles from the printing plant, in the town of Lansing, Tompkins County, the Society maintains an 800-acre farm staffed by approximately 130 additional Jehovah's Witnesses, who are either students or farm laborers and who receive benefits identical with those received by the workers in the Brooklyn plant. A Bible school is conducted near but not on the farm which is devoted exclusively to the production of crops and livestock that are used (1) to provide food for the students at the Bible school and for the other farm laborers; (2) to provide food for the workers in the printing plant in Brooklyn; and (3) to be sold to the general public.

The respondents, tax assessors of the town of Lansing, exempted the land upon which the Bible school is located from real property taxation, but refused to exempt the farm. The pertinent part of former section 4(6) of the Tax Law provided that an exemption shall be given to "the real property of a corporation or association organized exclusively for . . . religious, Bible, tract . . . purposes . . . and used exclusively for carrying out thereupon one or more of such purposes."

This case was tried before a special referee who denied the exemption sought. The referee observed that the tax status of the land in question had been previously litigated in *People ex rel. Watchtower Bible & Tract Soc'y, Inc. v. Mastin,* 191 Misc. 899, 80 N.Y.S.2d 323 (Sup. Ct. 1948), and that there an exemption had been denied on the grounds that the sale of food to the general public and the furnishing of food to the workers in the Brooklyn printing plant were not exempt purposes under the statute. In the principal case, the Society attempted to become eligible for the tax exemption by purposely reducing the sales of food to the public from approximately 10 per cent of total sales to 3 or 4 per cent. The referee distinguished *People ex rel. Watchtower Bible & Tract Soc'y, Inc. v. Mastin, supra,* on this ground, but denied the exemption because the large amounts of food shipped to the Brooklyn printing plant workers did not constitute an exempt purpose. The conclusion of the referee was based upon findings that such workers were not "ministers of religion" in the generally accepted meaning of the term and that the food was not furnished gratuitously but was given as compensation for their printing services.

The appellate division unanimously affirmed the order of the referee denying the tax exemption but gave the statute a more literal construction. The appellate court did not consider whether the printing plant workers were clergymen, or whether the food was furnished gratuitously, but relied upon the literal wording of the statute. It reasoned that in order for property to be eligible for an exemption, it must be used exclusively for carrying out "thereupon" one or more of the exempt purposes. The court concluded that even assuming that the sales of the food to the general public were merely incidental and that the printing operations were exempt within the meaning of the statute, the Society still failed to carry its burden of proof that the farm should not be taxed since the printing was done in Brooklyn, which is far removed from the land in question. The court determined that it would be an unwarranted extension of the statute to exempt farm lands remote from the location at which the actual religious work was done. *People ex rel. Watchtower Bible & Tract Soc'y, Inc. v. Haring,* 10 App. Div. 2d 167, 198 N.Y.S.2d 135 (1960).

The court of appeals, reversing the order of the appellate division, refused to apply such a strict construction of the tax exemption statute. It recognized that many New York decisions hold that an exemption must be given to a religious or educational organization if the lands in question are used to grow food for students, teachers, employees or members of the organization. See, *e.g., People ex rel. Missionary Sisters v. Reilly,* 85 App. Div. 71, 83 N.Y. Supp. 39, *aff'd,* 178 N.Y. 609, 70 N.E. 1107 (1903); *People ex rel. Blackburn v. Barton,* 63 App. Div. 581, 71 N.Y. Supp. 933 (1901); *People ex rel. Seminary of Our Lady of Angels v. Barber,* 42 Hun 27 (N.Y. Sup. Ct.) *aff'd,* 106 N.Y. 669, 13 N.E. 936 (1887). Although the growing of food was held to constitute an exempt purpose, the problem remained whether its consumption in a distant city affected its character. The court reasoned that the appellate division had placed too much emphasis upon the word "thereupon" and that the correct test is whether the farm operation is reasonably incident to the major purpose of its owner.

Prior New York decisions clearly held that the use of land by a charitable organization for raising food to be consumed by its members is an exempt use of property if the food is grown and consumed upon the same parcel of land. In *People ex rel. Blackburn v. Barton, supra,* the Religious Society of Friends, conducting an institution for the education of Indians, was given an exemption for so much of their land as was actually used for farm purposes for the use of the inmates. Similarly, in *People ex rel. Missionary Sisters v. Reilly, supra,* five Roman Catholic sisters who organized a corporation to instruct, shelter and guide orphan children were given an exemption for the lands upon which food was grown to feed the orphans.

In the principal case, the court recognized that an exemption statute must be construed strictly against those arguing for nontaxability. See *People ex rel. Mizpah Lodge v. Burke,* 228 N.Y. 245, 126 N.E. 703 (1920); *Young Women's Christian Ass'n. v. City of New York,* 217 App. Div. 406, 216 N.Y. Supp. 248 (1926); *People ex rel. Young Men's Ass'n. v. Sayles,* 32 App. Div. 197, 53 N.Y. Supp. 67, *aff'd,* 157 N.Y. 677, 51 N.E. 1093 (1898). The majority emphasized, however, that construction should not be so narrow and literal as to defeat the basic purpose of the legislation. Such an approach to the statute in question seems sound. Both the *Barton* and *Reilly* cases, *supra,* illustrate that religious societies are entitled to exemptions where the food is both raised and consumed upon the same parcel of land. The exemption would not be defeated in such cases even by a strict construction of the statute. Moreover, former section 4(6) of the Tax Law had been given a liberal construction in *People ex rel. Seminary of Our Lady of Angels v. Barber, supra.* In that case, college buildings were situated upon a farm used for supplying vegetables, grain, butter and pork for the teachers and students; it was held that because the farm was devoted to those purposes and for the express benefit of the institution, it was entitled to a tax exemption. The importance of the holding in the *Barber* case lies in the fact that the tax exemption was allowed even though the farm lands were physically separated from the educational buildings by railroad tracks. The court in that case was of the opinion that a more strict construction of the statute would defeat the very purposes for which it was enacted and would discourage rather than encourage corporate institutions of a religious or educational character.

The *Barber* case was not the first example of a less rigid interpretation of a tax exemption statute in New York. It had previously been held that the land of an educational institution would not be denied an exemption merely because a highway separated its land into two parcels. *People ex rel. St. John's College v. Commissioners,* 10 Hun 246 (N.Y. Sup. Ct. 1877).

The majority's reasoning in the principal case is adequately supported by the trend of decisions in New York involving the application of property tax exemptions in favor of religious, charitable and educational institutions. Precedent was set in the *St. John's College* case and in the *Barber* case where exemptions were granted even though the land upon which the food was grown was separate and distinct from the land upon which the institutional buildings were situated. The court of appeals rejected the reasoning of the appellate division that such prior decisions were to be distinguished from the instant case on the basis of distance between the farm parcel and place of ultimate consumption. The court concluded that distance separating noncontiguous parcels is not an adequate criterion to be employed in determining whether a tax exemption is justified, since the purpose of the statute to foster and encourage religious, educational and charitable organizations should not be defeated by such an arbitrary construction.

The recent case of *Pace College v. Boyland,* 4 N.Y.2d 528, 151 N.E.2d 900, 176 N.Y.S.2d 356 (1958), further exemplifies the liberal construction of former section 4(6) of the Tax Law. Pace College, an exempt corporation under the statute, furnished food to its students, faculty and staff in a cafeteria on the college premises; the cafeteria was conducted for profit by an independent private corporation. The dissenting judges, advocating a strict construction of the statute, argued that an exemption should be denied on the ground that the cafeteria was actually operated by a nonexempt corporation. However, the majority, reasoning that a less rigid interpretation would best fulfil the purposes of the exemption statute, held in favor of exemption.

In relaxing the rule that an exemption statute must be strictly construed against those arguing for nontaxability, the court of appeals in *People ex rel. Watchtower Bible & Tract Soc'y, Inc. v. Haring* has affirmed its policy to encourage, foster and protect religious, charitable and educational institutions. The beneficial services that such organizations perform for the public in advancing religious, moral and intellectual culture justifies tax exemptions afforded them.

A. F. M.

SALES—IMPLIED WARRANTIES—MODIFICATION OF THE PRIVITY RULE—*Greenberg v. Lorenz,* (New York, 1961)

The New York Court of Appeals recently held that an infant may maintain an action against a retailer for damages for breach of the implied warranty of quality of food purchased by her parent. *Greenberg v. Lorenz,* 9 N.Y.2d 195, — N.E.2d —, — N.Y.S.2d —, (1961). At the time of the sale in question, plaintiff, a fifteen year old girl, resided with and was supported by her parents. The defendants conducted a neighborhood store at which the father of the plaintiff purchased a can of brand name salmon. At the evening meal the plaintiff was injured when she bit into a piece of the salmon that concealed a metal fisheries tag. The tag apparently had not been removed from the salmon at the time that it was processed and canned.

The plaintiff based her cause of action solely upon an alleged breach of implied warranty that the salmon was fit for consumption and was of merchantable quality. N. Y. Personal Property Law § 96(1), (2); Uniform Sales Act § 15(1), (2). The retail food dealer rested upon the plaintiff's case and moved for dismissal of the plaintiff's complaint, relying upon the lack of privity of contract between the plaintiff and himself as a defense. *Chysky v. Drake Bros. Co.,* 235 N.Y. 468, 139 N.E. 576 (1923), was cited by the retailer in support of his motion.

The trial court denied the defendant's motion for dismissal of the plaintiff's complaint and directed judgment for the plaintiff, holding that although the salmon was purchased by the plaintiff's father, the implied warranty of wholesomeness extended to the plaintiff as a matter of law. *Greenberg v. Lorenz,* 14 Misc. 2d 279, 178 N.Y.S.2d 404 (N.Y. City Ct. 1957). The appellate term affirmed, stating that the privity requirement in warranty suits as a condition for recovery was a "pure legalism" and contrary to social custom. That court concluded that the requirement would be abolished by the court of appeals when again faced with the issue. *Greenberg v. Lorenz,* 12 Misc. 2d 883, 178 N.Y.S.2d 407 (App. T., 1958). In a per curiam decision, the appellate division reversed, citing *Chysky v. Drake Bros. Co., supra,* and dismissed the plaintiff's complaint. *Greenberg v. Lorenz,* 7 App. Div. 2d 968, 183 N.Y.S.2d 46 (1959).

The court of appeals held that the infant's cause of action should not have been dismissed solely on the ground that the food was purchased not by the child, but by the child's father. The court rested its decision essentially upon public policy, stating that the injustice of denying damages to a child merely because of lack of privity seemed too plain for argument. In so deciding, the court of appeals has taken a significant step in modifying a concept deeply entrenched in the commercial law of New York state. Section 96 of the Personal Property Law provides for implied warranties of quality accompanying the sale of goods. Although the statute does not by its terms require privity of contract for recovery under this section, the courts of New York had limited recovery for breach of implied warranties to persons in privity with the seller. The leading case in this jurisdiction has been *Chysky v. Drake Bros. Co.,* 235 N.Y. 468, 139 N.E. 576 (1923), in which a retail bakery was held not liable for breach of implied warranty to an employee of the buyer who was injured by a nail baked in a cake. The court of appeals has often reaffirmed this rule. *E.g., Campo v. Scofield,* 301 N.Y. 468, 95 N.E.2d 802 (1950); *Gimenez v. The Great Atl. & Pac. Tea Co.,* 264 N.Y. 390, 191 N.E. 27 (1934); *Ryan v. Progressive Grocery Stores, Inc.,* 255 N.Y. 388, 175 N.E. 105 (1931); *Turner v. Edison Storage Battery Co.,* 248 N.Y. 73, 161 N.E. 423 (1928); *Redmond v. Borden's Farm Prods. Co.,* 245 N.Y. 512, 157 N.E. 838 (1927).

Legal writers and commentators have frequently expressed misgivings over the privity doctrine. See Perkins, *Unwholesome Food as a Source of Liability,* 5 IOWA L. BULL. 86, 96; Melick, *Sale of Food and Drink* 94 (1936); Starke, *Implied Warranties of Quality and Wholesomeness in* *the Sale of Food,* 137 N.Y. L.J. Nos. 67–69, p. 4 col. 1 (1957); Miller, N.Y. STATE BAR BULL., Oct. 1952, p. 331. Proponents of strict liability point to the public interest in the utmost safety of products, society's demand for the maximum protection of the consumer, the implied assurance of quality and safety in placing goods upon the market and the consequent reliance of the consumer upon this assurance, and the fact that the ultimate consumer is the seller's ultimate objective. Twenty-two states, swayed by these considerations, have rejected the privity requirement in food cases. See Prosser, *The Assault Upon the Citadel,* 69 YALE L.J. 1099, 1107–08 (1960). The Uniform Commercial Code, adopted in six states, extends both express and implied warranties to the purchaser's family, household and guests. Uniform Commercial Code § 2–318.

In 1943 and 1945, the New York State Law Revision Commission recommended that section 96 of the New York Personal Property Law be amended to extend the implied warranties of quality created thereby to the buyer's employees and to the members of his household. N. Y. State Law Rev. Comm. Rep., Legis. Doc. No. 65(J), p. 413 (1943); N. Y. State Law Rev. Comm. Rep., Legis. Doc. No. 65(A), p. 24 (1945). Both bills died in committee. In 1959, the Law Revision Commission proposed a new section to be added to the Personal Property Law that would extend the seller's warranty to persons who are employees, guests or members of the buyer's household when it is reasonable to expect that such persons may use the goods. N. Y. State Law Rev. Comm. Rep., Legis. Doc. No. 65(B) (1959). The legislature has not yet acted upon this proposal.

With the exception of a few recent lower court decisions, *Welch v. Schiebelhuth,* 11 Misc. 2d 312, 169 N.Y.S.2d 309 (Sup. Ct., 1957); *Parish v. The Great Atl. & Pac. Tea Co.,* 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958); *Conklin v. Hotel Waldorf Astoria Corp.,* 5 Misc. 2d 496, 161 N.Y.S.2d 205 (N.Y. City Ct. 1957), the rigors of the privity requirement in warranty suits were relaxed only where the buyer could be said to be acting as the agent of the injured plaintiff in making the purchase. Under this theory, an injured spouse of the purchaser has been allowed recovery. *Mouren v. The Great Atl. & Pac. Tea Co.,* 1 N.Y.2d 884, 136 N.E.2d 715, 154 N.Y.S.2d 642 (1956); *Ryan v. Progressive Grocery Stores, Inc.,* 255 N.Y. 388, 175 N.E. 105 (1931). Similarly, where two sisters lived in a common household and shared living expenses, the one who bought the food was deemed the agent of the other; privity was found and recovery allowed. *Bowman v. The Great Atl. & Pac. Tea Co.,* 284 App. Div. 663, 133 N.Y.S.2d 904 (1954), *aff'd,* 308 N.Y. 780, 125 N.E.2d 165 (1955). Almost without exception, the agency theory was not extended to the parent-child relationship where the child of the purchasing parent was the injured plaintiff. *Redmond v. Borden's Farm Prods. Co.,* 245 N.Y. 512, 157 N.E. 838 (1927); *Salzano v. First Nat'l Stores,* 268 App. Div. 993, 51 N.Y.S.2d 645 (1944); *Massey v. The Borden Co.,* 265 App. Div. 839, 37 N.Y.S.2d 571 (1942); *Smith v. Hanson,* 228 App. Div. 634, 238 N.Y. Supp. 86 (1929). *Contra, Lieberman v. Sheffield Farms—Slawson Decker Co.,* 117 Misc. 531, 191 N.Y. Supp. 593 (Sup. Ct. App. T. 1921). The third-party beneficiary theory has been expressly rejected in warranty cases by the court of appeals. *Gimenez v. The Great Atl. & Pac. Tea Co.*, 264 N.Y. 390, 191 N.E. 27 (1934).

In the absence of privity, the only remedies available to the injured child were a negligence action, *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), or an action based on the violation of a statutory duty, *Pine Grove Poultry Farm v. Newton By-Prods. Mfg. Co.*, 248 N.Y. 293, 162 N.E. 84 (1928). In a products liability case, the plaintiff suing in negligence must ordinarily rely on res ipsa loquitur since he rarely has any direct proof as to what caused the defect in the product. In order to come within this doctrine, the plaintiff must trace his injury to a cause for which the defendant was responsible, *Manley v. New York Tel. Co.*, 303 N.Y. 18, 100 N.E.2d 113 (1951), and in the usual case where the product passes through the hands of many dealers, this may make recovery impossible. See *Hardie v. Boland Co.*, 205 N.Y. 336, 98 N.E. 661 (1912); *Jacobs v. Childs Co.*, 166 N.Y. Supp. 798 (N.Y.C. Munic. Ct. 1916). Even when the plaintiff can come within the doctrine, the inference of negligence may often be rebutted by evidence showing the precautions taken by the defendant in handling the food. See *Shepard v. Beck Bros., Inc.*, 131 Misc. 164, 225 N.Y. Supp. 438 (N.Y. City Ct. 1927). As noted by the court in the principal case, when suing for damages for breach of the statutory duty imposed by the Agricultural and Markets Law, the plaintiff is limited to those cases where the food is rendered unfit by reason of adulteration and decomposition, as distinguished from foreign substances such as stones or tacks or broken glass. *Bourcheix v. Willow Brook Dairy, Inc.*, 268 N.Y. 1, 196 N.E. 617 (1935); N.Y. Agri. & Mkts. Law §§ 199-a, 200.

Recent lower court decisions, expressing general dissatisfaction with the privity requirements, have allowed recovery by the buyer's children and guests. *Welch v. Schiebelhuth*, 11 Misc. 2d 312, 169 N.Y.S.2d 309 (Sup. Ct. 1957); *Parish v. The Great Atl. & Pac. Tea Co.*, 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958); *Conklin v. Hotel Waldorf Astoria Corp.*, 5 Misc. 2d 496, 161 N.Y.S.2d 205 (N.Y. City Ct. 1957).

In its inception, the action for breach of warranty was a pure tort action, Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888); 1 Williston, *Sales* 368–369 (2d ed. 1924), limited to express warranties, *Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (Exch. Ch. 1603), and closely allied to deceit, Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1126 (1960). When implied warranties of title and quality were recognized, *Holcombe v. Hewson*, 2 Camp. 391, 170 Eng. Rep. 1194 (K.B. 1810); *Medina v. Stoughton*, 1 Salk 210, 1 Ld. Raym. 593, 91 Eng. Rep. 188 (K.B. 1700); *Jones v. Bright*, 5 Bing. 533, 130 Eng. Rep. 1167 (C.P. 1829) voluntary assumption of obligations by the seller ceased to be the only basis of liability, *Hoe v. Sanborn*, 21 N.Y. 552, 78 Am. Dec. 163 (1860). *Stuart v. Wilkind*, 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778) has often been cited as the first reported case holding that an action for breach of warranty could lie in contract, as well as in tort. Thereafter, although the usual remedy for breach of express and implied warranties came to be a contract action, Prosser, *Torts*, 493 (2d ed. 1955), the action never completely lost its tort characteristics. In New York, the tort rather than the contract aspect governs the survival of actions, *Bernstein v. Queens County Jockey Club,* 222 App. Div. 191, 225 N.Y. Supp. 449 (1927) and recovery for wrongful death, *Greco v. S. S. Kresge Co.,* 277 N.Y. 26, 12 N.E.2d 557 (1938), and a defense akin to contributory negligence is ofttimes maintainable. See *Fredendall v. Abraham & Straus, Inc.,* 279 N.Y. 146, 18 N.E.2d 11 (1938); see also *Comment,* 25 ALBANY L. REV. 67 (1960). The tortious nature of the action is evidenced by the idea of a misrepresentation of fact, whether intentional or otherwise, in express warranties, and of liability implied by law and independent of any consensual arrangement, in implied warranties. Warranty thus originally evolved as the child of both contract and tort, but the courts, influenced by the fact that assumpsit became the usual mode of enforcing warranties, (see Miller, N. Y. STATE BAR BULL., Oct. 1952, p. 330), regarded them as terms of the contract of sale, Prosser, *Torts* 493 (2d ed. 1955), and enforceable only by the immediate contracting parties. *Bordwell v. Collie,* 45 N.Y. 494 (1871).

Such appears to have been the state of the law when section 96 of the Personal Property Law was enacted in 1911 and perhaps explains the absence of any reference to privity within the statute. The section speaks only in terms of buyer and seller and adopts the contractual concept. It specifically states that there are no implied warranties of quality except as set forth. Thus, although the section does not mention privity of contract as a requirement for recovery under the section, it does not seem suprising that the New York courts felt compelled to imply such a provision. *Chysky v. Drake Bros. Co.,* 235 N.Y. 468, 139 N.E. 576 (1923).

The court in the principal case, apparently concerned with whether it was a legislative or judicial function to modify the privity requirement, took cognizance of the ". . . real doubt as to the propriety of changing the rule," but allayed its misgivings by accepting the premise that the rule itself was of judicial making since the statutes say nothing at all about privity. It might be observed that at least six jurisdictions with statutes substantially similar to those of New York have recognized strict liability for breach of warranty in food cases without the benefit of additional legislative enactments. *Klein v. Duchess Sandwich Co.,* 14 Cal. 2d 272, 93 P.2d 799 (1939); *Patargias v. Coca-Cola Bottling Co. of Chicago,* 332 Ill. App. 117, 74 N.E.2d 162 (1947); *Davis v. Van Camp Packing Co.,* 189 Iowa 775, 176 N.W. 382 (1920); *Ward Baking Co. v. Trizzino,* 27 Ohio App. 475, 161 N.E. 557 (1928); *Nock v. Coca-Cola Bottling Works of Pittsburgh,* 102 Pa. Super. 515, 156 Atl. 537 (1931); *Nelson v. West Coast Dairy Co.,* 5 Wash. 2d 284, 105 P.2d 76 (1940).

The employment of the agency theory by New York courts in order to find privity and thus mollify the harshness of the rule has led to some apparently contradictory holdings. Where the wife was injured, she was found to be the principal and the buyer, and recovery was denied the husband for loss of consortium and medical expenses because of lack of privity with the seller; it was reasoned that only one of them could be the principal to the contract of sale. *Gimenez v. The Great Atl. & Pac. Tea Co.*, 264 N.Y. 390, 191 N.E. 27 (1934). But where the husband was injured, the wife was found to have purchased as his agent. *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 175 N.E. 105 (1931). Recently the agency theory was employed to let both husband and wife recover. *Mouren v. The Great Atl. & Pac. Tea Co.*, 1 N.Y.2d 884, 136 N.E.2d 715, 154 N.Y.S.2d 642 (1956). The court in the instant case avoided adding further confusion to the field of New York warranty law by refusing to employ any such legal fictions.

The court of appeals in *Greenberg v. Lorenz* carefully limited its holding to the facts of the case, noting that ". . . [in this area] we should be cautious and take one step at a time." The court cautiously avoided simply stating that privity is no longer required in New York, being apparently unwilling to make a decision that would logically result in imposing absolute liability for any product distributed upon all vendors in favor of everyone no matter how remotely connected with the original sale. See Hart, *Commercial Law, 1959 Survey of New York Law,* 34 N.Y.U.L. Rev. 1445 (1959).

The lines of modification of the privity requirement were not clearly drawn, and the *Greenberg* decision leaves room for extension of strict liability to other cases. There seems to be little reasonable basis for allowing a suit in the instant situation and denying the purchaser or the members of his family a cause of action directly against the manufacturer in food warranty actions. If the retailer is to be held liable to one who has never heard his name, the manufacturer should have no better claim to immunity. Indeed, if it be conceded that under modern conditions the ultimate consumer often relies on the representations of the manufacturer who, by advertisements, creates the demand in today's business world, it would seem more equitable in many cases to hold the manufacturer liable rather than the retailer who generally serves as a mere conduit in passing the goods from the manufacturer to the public. Furthermore, by the employment of impleader, N.Y. Civ. Prac. Act § 193-a, the manufacturer may still be required to pay the plaintiff's damages, and the retailer is then needlessly exposed to the expense and inconvenience of a lawsuit because of the privity requirement. Since the modification of the privity rule in the instant case rests essentially upon public policy, and since the same policy reasons would be present in a suit brought directly against the manufacturer, it appears not to be unlikely that when the question is squarely presented to the court of appeals, it will follow the lead of a number of states that permit suits to be brought by the purchaser or his family directly against the manufacturer for breach of warranty in food cases. See *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 93 P.2d 799 (1939); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920); *Swengel v. F & E Wholesale Grocery Co.*, 147 Kan. 555, 77 P.2d 930 (1938); *Hertzler v. Manshum,* 228 Mich. 416, 200 N.W. 155 (1924); *Coca-Cola Bottling Works v. Lyons,* 145 Miss. 876, 111 So. 305 (1927); *Ward Baking Co. v. Trizzino,* 27 Ohio App. 475, 161 N.E. 557 (1928); *Catani v.*

Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915); *Jacob E. Decker & Sons v. Capps,* 139 Tex. 609, 164 S.W.2d 828 (1942); *Mazzetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913).

S. M. K.

TORTS—NEGLIGENCE—INFANTS—RIGHT OF ACTION FOR PRENATAL INJURIES TO NON-VIABLE FOETUS—*Sinkler v. Kneale,* (Pennsylvania, 1960)

In *Sinkler v. Kneale,* 401 Pa. 267, 164 A.2d 93 (1960), the Supreme Court of Pennsylvania held that an infant has a cause of action for prenatal injuries sustained as the result of the negligence of another while the infant was a non-viable foetus. This decision overruled *Berlin v. J. C. Penny Co.*, 339 Pa. 547, 16 A.2d 28 (1940), which had denied relief to a child who had incurred prepartum injuries due to the negligence of another.

In the *Sinkler* case, plaintiff's mother, who was one month pregnant with the infant defendant, was driving her automobile when it was struck from the rear by the defendant due to the latter's alleged negligent operation of his vehicle. Plaintiff claimed that this collision caused such injury to her that she was born a Mongoloid. She sought damages in the amount of $100,000 for the resultant pain, suffering and humiliation, as well as for medical expenses, and loss of earnings and of earning power. Plaintiff filed her complaint, represented by her father as natural guardian, in the common pleas court, Chester County. Defendant's preliminary objections to the complaint were sustained and judgment was entered in his favor from which the plaintiff appealed.

In determining the sufficiency of the complaint, the Supreme Court of Pennsylvania reappraised that state's attitude toward the cause of action for prenatal injuries. After reëxamining the traditional theory underlying the denial of the cause of action—that the foetus is a part of its mother until birth and is not a person *in esse* to whom a duty of care can be owed—the court concluded that that theory had been negated by modern advances in medical science. The court adopted the rationale of *Smith v. Brennan,* 31 N.J. 353, 157 A.2d 497 (1960), that the existence of an infant separate from its mother begins at the moment of conception. The court in the *Brennan* case pointed out that it is generally recognized by embryologists that from the time of conception the foetus does not depend on the mother except for sustenance and protection, for which the child also depends throughout a considerable period of time following birth. Instead of the foetus being a part of the mother, it lives with the mother and from the time of conception develops its own distinct personality.

Another factor influencing the court's determination in the *Sinkler* case was that eighteen other states had recognized the cause of action set forth by the plaintiff. Of the eight states that have explicitly disallowed the action, two have recognized the current trend and have indicated possible reversal. See *LaBlue v. Specker,* 358 Mich. 558, 100 N.W.2d 445 (1960);

Puhl v. Milwaukee Auto Ins. Co., 8 Wis.2d 343, 99 N.W.2d 163 (1960). Two other states have expressly said that they did not pass upon the question concerning the rights of a child born alive. See *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 50 N.W.2d 229 (1951); *Howell v. Rushing*, 261 P.2d 217 (Okla. 1953). Moreover, the majority opinion recognized that the jurisdictions on which *Berlin* relied subsequently reversed their positions and now uphold the cause of action when the child is born alive. See *Amann v. Faidy*, 415 Ill. 422, 114 N.E.2d 412 (1953); *Keyes v. Construction Service, Inc.*, 165 N.E.2d 912 (Mass. Sup. Ct. 1960); *Smith v. Brennan, supra; Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951).

In deciding the principal case, the court disregarded the test as to the viability of the foetus at the time of the injury. It reasoned that the condition of viability can have no relevant connection with the infant's basic right to sue since a foetus is regarded as having existence as a separate person from the moment of conception. The court treated the viability test as no longer valid or functional and ruled that the question of recovery in such cases is primarily one of causation, of which sufficient medical proof is required.

The single dissenting judge felt that the cause of action should continue to be disallowed in absence of a statute to the contrary and regarded *Berlin* as stare decisis. He did not consider the separate existence of the foetus to be the real issue in the case, but rather was primarily concerned with the question whether medical knowledge in this field had changed sufficiently since the *Berlin* case to warrant a change in the judicial position with regard to prenatal injuries. The dissenting justice concluded that medical knowledge had not so changed and that medical authorities generally agree that Mongolism exists from conception due to defective parental genes and cannot be caused by prenatal trauma. His strongest objection to plaintiff's cause of action was that to permit the maintenance of the action would open the door to recovery for every conceivable congenital defect or disease allegedly resulting from the negligence of drivers of automobiles, and even for injuries sustained by the infant due to the negligent acts of its mother during pregnancy. The result, he pointed out, would be to overburden the courts with conjectural and fictitious claims and to promote family discord. He also concluded that the question whether the alleged negligence caused the injuries was sheer speculation.

Kine v. Zuckerman, 4 Pa. D.&C. 227 (C.P.Phil. 1924), was the first case in Pennsylvania to deal with this cause of action and one of the first in the United States to sustain the cause of action. However, the court in that case expressed doubt whether the plaintiff could prove, on trial, a causal connection between the injury and the fact that the child was subsequently born with only one hand. By implication the decision in *Kine* was overruled by *Berlin*.

Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884), the parent case dealing with the right of action for prenatal injuries, was the universally cited authority in the United States and England for denying the existence of such a cause of action. It was followed in New York in *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921), and was not overruled until 1951 by *Woods v. Lancet, supra.* The classic reasons for denying a cause of action for prenatal injuries included a lack of favorable precedent, stare decisis, the apparent unity of mother and foetus, the conjectural nature of causal relationship, and the possibility of fictitious claims. The courts in the jurisdictions that have sustained the cause, including the New York Court of Appeals in *Woods v. Lancet,* have reversed their earlier stand by reviewing and discarding those reasons. They have taken cognizance of modern scientific and medical advances that have demonstrated that an unborn child is a person separate from its mother. The argument that proof of causation of prenatal injuries would be too conjectural loses its effectiveness because of the procedural requirement that the causal connection between the injury and the alleged negligence be shown by a preponderance of evidence. To the criticism that recovery will result in the assertion of fictitious claims it is answered that such a danger exists in every phase of the law and should not arbitrarily prevent recovery. Finally, it is reasoned that neither stare decisis nor lack of favorable precedent alone should prevent judicial recognition and enforcement of a right of action.

Unlike the Pennsylvania court in *Sinkler v. Kneale,* most jurisdictions, including New York, that have sustained this cause of action have limited it to infants that were viable at the time of the injury; *i.e.,* the foetus must be so developed as to be capable of delivery and living separate from its mother. Because the foetus in the *Woods* case was viable when the injuries occurred, the New York court explicitly declined to consider liability for injuries sustained by a non-viable foetus. Two years later, however, the appellate division of the supreme court of New York considered a case involving injury to a three-month old foetus, and held that the child, on being born alive, had a right to sue. *Kelly v. Gregory,* 282 App. Div. 542, 125 N.Y.S.2d 696 (1953). The *Kelly* decision pointed out that its holding was not contrary to but only a proper extension of *Woods v. Lancet.* The *Kelly* rationale was that the prerequisite of legal separability of the foetus at the time of the injury should be recognized as beginning where there is biological separability; *i.e.,* at conception. The court stated that although the mother contributes biologically to the foetus from conception in the way of nourishment and protection, the foetus is an individual organism. The appellate division reasoned that although the termination of protection and nourishment prior to the stage of viability will kill the foetus, this fact does not destroy the separability of the foetus but merely describes the conditions under which its life will not continue. The *Kelly* case was the first case in any jurisdiction to sustain a cause of action for prepartum injuries to a non-viable embryo.

The enlightened approach of the *Sinkler* and *Kelly* cases, which disregards the viability test, is an attempt to reconcile the law with contemporary medical concepts. The viability theory is unrealistic in that it draws an arbitrary line between liability and non-liability on the basis of outmoded medical hypotheses. Embryologists agree that the viable stage of the fetal existence is ordinarily reached between the 26th and 28th weeks of pregnancy. Gradwohl, *Legal Medicine* 834 (1954). This is not an infallible rule of nature and the exact time varies with every infant. The only certain method by which to determine viability would be to have the infant born prematurely and then to observe whether it is capable of surviving separate from its mother. Even this absurd approach would raise an issue as to how long such an infant must live after birth to be deemed viable. The more reasonable and just approach to the problem would be to apply the biological realities of prenatal existence. Unquestionably, proof of the causal relationship between a negligent act and an alleged resulting injury to the foetus, sustained soon after conception, will be more difficult to establish than in the situation where the foetus was viable when injured. This obstacle and that of possible fictitious claims can be surmounted only by requiring competent medical evidence.

An additional argument against the viability test is the desire for consistency in the operation of the law. The common law has long applied the rule that a child *en ventre sa mere* is "born" and "alive," for all purposes for its own benefit, in applying the rules of testate and intestate succession. See *Marsellis v. Thalhimer,* 2 Paige Ch. 35 (N.Y. 1830); *Matter of Holthusen,* 175 Misc. 1022, 1024, 26 N.Y.S.2d 140, 143 (Sup. Ct. 1941). And section 83(12) of the New York Decedent Estate Law specifically provides that a descendant or distributee of a deceased, begotten before deceased's death but born thereafter, shall take in the same manner as if he were born within the decedent's lifetime and had survived him.

The criminal law recognizes that in some respects a non-viable foetus has a legal personality. The New York Penal Law makes the wilful killing of an unborn quick child (embryo capable of independent movement), by injury committed on the person of the mother, manslaughter in the first degree, and punishes as a felony the killing of a child by abortion. N.Y. Penal Law, §§ 80, 81, 1050, 1051. Sections 500 and 501 of the New York Code of Criminal Procedure also provide for the suspension of the execution of a pregnant female, regardless of the stage of gestation, who has been condemned to death. The fact that these other branches of the law do not establish any viability test suggests that such a test ought not to be established in the law of torts.

Most jurisdictions in allowing recovery for prenatal injuries have specifically provided that the infant must be born alive for the cause of action to arise. Only nine states have allowed recovery for the wrongful death of a stillborn infant resulting from prepartum injuries: *Prates v. Sears, Roebuck & Co.,* 19 Conn. Supp. 487, 118 A.2d 633 (Super. Ct. 1955); *Worgan v. Greggs & Ferrerra, Inc.,* 50 Del. 258, 128 A.2d 557 (1956); *Porter v. Lassiter,* 91 Ga. App. 712, 87 S.E.2d 100 (1955); *Mitchell v. Couch,* 285 S.W.2d 901 (Ky. 1955); *Valence v. Louisiana Power & Light Co.,* 50 So.2d 847 (La. 1951); *Verkennes v. Corniea,* 229 Minn. 365, 38 N.W.2d 838 (1949); *Rainey v. Horn,* 221 Miss. 269, 72 So.2d 434 (1954); *Poliquin v. MacDonald,* 101 N.H. 104, 135 A.2d 249 (1957); *Stidnan v. Ashmore,* 109 Ohio App. 431, 167 N.E.2d 106 (1959). New York has required quick birth as a condition precedent to a right of action. *E.g., Woods v. Lancet, supra* (dictum); *In re Logan's Estate,* 4 Misc.2d 283, 156 N.Y.S.2d 49, *aff'd,* 2 App. Div. 2d 842, 156 N.Y.S.2d 152, *aff'd,* 3 N.Y.2d 800, 144 N.E.2d 644, 166 N.Y.S.2d 3 (1957); *Kelly v. Gregory, supra* (dictum); *Banas v. City of Syracuse,* 204 Misc. 201, 125 N.Y.S.2d 490, *aff'd,* 282 App. Div. 826, 122 N.Y.S.2d 532, *appeal denied,* 282 App. Div. 850, 125 N.Y.S.2d 288 (1953). The primary reason for this requirement is that birth is considered to be the point in time at which the existence of a natural person begins. A foetus born dead, it is reasoned, has never come into legal existence as a person capable of having or acquiring any rights.

The court in the *Sinkler* decision did not allude to a requirement of quick birth, one reason probably being that Pennsylvania's wrongful death and survival statutes make no provision for an action of the type that would be brought in behalf of a stillborn infant for prepartum injuries. Section 1601 of the Pennsylvania Civil and Equitable Remedies and Procedures Law provides for an action by a personal representative for damages arising out of death caused by the negligence of another where the injured party brought no suit for damages during his lifetime. The damages recoverable under that statute are to be measured by pecuniary loss to relatives as a result of their being deprived of the deceased's earnings that they would have otherwise received, and by pecuniary loss incurred due to medical, nursing, and funeral expenses. It would seem that none of these damages, with the possible exception of funeral expenses, would arise out of the stillbirth of a child. The Supreme Court of Pennsylvania has also ruled that exemplary damages cannot be recovered in an action by parents for injuries to their child resulting in its death, *Palmer v. Philadelphia, B. & W. R.R.,* 218 Pa. 114, 66 Atl. 1127 (1907), and that under the wrongful death statute there can be no recovery for injuries to the deceased, or for pain and suffering experienced by him, *Kaczorowski v. Kalkosinski,* 321 Pa. 438, 184 Atl. 663 (1936). Thus, although the *Sinkler* case did not pass upon the question, it seems that there can be no recovery in Pennsylvania for prenatal injuries sustained by an infant born dead.

Numerous problems arise when the cause of action for negligent prenatal injury is recognized. One of the most difficult of these problems lies in the strictness with which the rule of foreseeability of harm will be applied. In New York, two problems that face other jurisdictions in relation to recovery by an infant for prenatal injuries have been resolved. By statute, the question whether an infant's right to recover will be impaired or defeated by the contributory negligence of his mother has been settled: section 737 of the Domestic Relations Law provides that the contributory negligence of a parent will not be imputed to the child. Furthermore, it seems that an infant has no cause of action in New York against his mother based upon her negligent acts during pregnancy resulting in damage to the foetus, in view of *Sorrentino v. Sorrentino,* 248 N.Y. 626, 162 N.E. 551 (1928), holding that a child has no cause of action for personal injuries inflicted by a negligent parent.

The most pressing issue raised concerning recovery for prenatal injury will involve the measure and form of proof required to establish the causal connection between the alleged negligence and the injury. Little is known of the causes of most congenital anomalies, and possible causes are too numerous and interrelated to be subject to accurate or specific linkage with particular congenital defects. In early stages of development, congenital abnormalities are difficult to detect and to distinguish from normal growth patterns. See Corner, *Ourselves Unborn* 101 (3d ed. 1944). Furthermore, the study of embryology has revealed that the interuterine habitat of the human embryo is so carefully sheltered that traumatic injury to the foetus through falls or blows is very unlikely. See Patten, *Human Embryology* 227–232 (1946).

An extensive survey by Hartig and Sheldon, two noted embryologists, demonstrates the relative insignificance of trauma experienced externally by the mother as compared to other causes of malformation of the foetus. Their study of one thousand sample case histories of spontaneous abortion (abortion as used here means premature expulsion of the foetus) revealed only one that was truly a traumatic abortion. And upon examining seven pediatricians and obstetricians who represented an aggregate of 157 years of practicing experience, Hartig and Sheldon were told that only six bona fide traumatically induced abortions had been witnessed. 117 *Annals of Surgery* 596 (1943).

The dissent in *Sinkler v. Kneale* took cognizance of the complexities surrounding the causes and effects of prenatal injuries. However, the problem of proof in these cases should not be the reason for denying relief where such proof can be provided.

S. S. D.

TRADE-MARKS—UNFAIR COMPETITION—RESALE OF REBOTTLED TRADE-MARKED PRODUCTS—CONSTRUCTION OF SECTION 2354 OF NEW YORK PENAL LAW—*Lanvin Parfums, Inc. v. Le Dans, Ltd.*, (New York, 1960)

In *Lanvin Parfums, Inc. v. Le Dans, Ltd.*, 12 App. Div. 2d 104, 208 N.Y.S.2d 675 (1960), the appellate division held that in the absence of any showing of fraud or deception practiced upon the public, the rebottling of plaintiff's trade-marked product into smaller containers and resale of the same by the defendants did not give rise to a cause of action in equity for an injunction either under section 2354(6) of the New York Penal Law or under the existing decisional law governing unfair competition and trade-mark infringement. The decision is especially noteworthy for its effect on the law of unfair competition—a relatively new area of the law in which the scope of interests afforded protection in equity is constantly expanding.

The plaintiff is engaged in the business of importing perfumes which it markets in this country under its "Lanvin" trade-mark, accompanied by such familiar brandnames as "Arpege" and "My Sin." The plaintiff sells the perfumes either in the original packages or as toilet water "packaged by Lanvin." The defendants, three corporations dealing in cosmetics and the chief officer and stockholder of each corporation, were allegedly purchasing toilet water placed on the market by Lanvin and rebottling it in smaller containers to sell to the public at a much lower price. The following is a reproduction of the label used by one of the defendants that the court considered in reaching its decision:

"LANVIN'S
ARPEGE

Eau de Lanvin

REBOTTLED
FROM THE
GENUINE PRODUCT

By

Le Dans, Ltd.

WHOLLY INDEPENDENT
OF LANVIN

New York, N.Y. 1 Dram"

In an attempt to prevent defendants from continuing this practice, Lanvin, relying primarily upon section 2354(6) of the Penal Law, commenced a suit for an injunction restraining defendants from using this label. Section 2354(6) provides in substance that it shall be a misdemeanor for one to sell goods held out to be the product of another unless such goods are resold in the original package under trade-marks or names placed upon said package by the manufacturer who has acquired the right to such trade-marks or names. The defendants moved at special term to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court denied the motion, holding that the complaint sufficiently pleaded a violation of the penal statute and that fraud or deception was not a necessary element to plaintiff's cause of action.

The appellate division reversed the order and granted the defendants' motion to dismiss the complaint, basing its decision upon the absence of any showing that the defendants' conduct resulted in a fraud or deception on the public who bought the rebottled article. The court thus construed the statute as applicable only where fraud or deception exists, regardless of the fact that the subdivision relied upon by plaintiff does not expressly specify such a requirement. Several different grounds were presented by the court to support their dismissal of the plaintiff's complaint. First, it was stated that in all previous prosecutions under the statute, fraud or deception were required before a violation could be found. Second, the court pointed out that the section in which subdivision 6 is found is generally directed against fraudulent acts. Third, the court reasoned that if the statute were not construed as legislation intended to prevent fraud, a question of constitutionality would arise as to whether it constituted a proper exercise of the state's police power. Fourth, it was stated that under the trade-mark laws, "the resale in repackaged form of the trade-mark owner's product, with trade-mark" was not enjoinable so long as it resulted in no deception on the public. Fifth, the court maintained that if plaintiff's construction of the statute were sustained, it would unfavorably limit commonly accepted business practices now in use. Finally, the appellate division relied upon the settled maxim that equity will not enjoin an act merely because it is criminal unless the act concurrently results in damage to or impairs a property right. On this point, the court ruled that the complaint established no damage to Lanvin in the absence of any showing of deception.

The decision indicates the reluctance to grant equitable protection from such business conduct in the absence of deception whether a complaining party proceeds under section 2354 of the Penal Law or under the law applicable to unfair competition and trade-mark infringement. The *Lanvin* case is unique in that the plaintiff chose to rely solely upon a penal statute in its attempt to obtain equitable relief without any express allegation of fraud or deception attributable to the conduct of the defendants. Prior decisions under the statute show that violations have been found only where such deception or fraud was present. See, *e.g., People v. Luhrs,* 195 N.Y. 377, 89 N.E. 171 (1909); *People v. Goetz,* 234 App. Div. 421, 255 N.Y. Supp. 267 (1932); *Pinaud Inc. v. Beaux Arts Chemists Corp.,* 170 Misc. 583, 10 N.Y.S.2d 893 (Sup. Ct. 1939); *People v. Griffin,* 71 Misc. 568, 128 N.Y. Supp. 946 (Sup. Ct. 1911).

In the principal case, much weight was given to the holding in the *Luhrs* case, *supra.* The defendant in that case was a bartender who had refilled Wilson Distilling Company whiskey bottles with whiskey of unknown origin and sold it to his customers without removing the Wilson label from the bottle. This act was held to be in violation of the statute since it deceived the public into believing that the contents of the bottle had been placed there by the Wilson Company whose label was on the bottle. The court of appeals emphasized that a consumer should be protected in its reliance upon the representations made by a label to the effect that the owner of the trade-mark thereon performed the bottling process since the bottling in itself is important as a guaranty of the quality of the article. In the principal case, the court ruled that the defendants' conduct did not result in any such deception since the label truthfully disclosed the relation of the plaintiff's name to the product on which it was being used.

The court in the *Lanvin* case stated that regardless of the presence of the statute relied upon, in order for equity to grant injunctive relief, it was incumbent upon the plaintiff to show damage occasioned by the defendants' practice. *Prestonettes, Inc. v. Coty,* 264 U.S. 359 (1924) was cited by the appellate division for the proposition that trade-mark rights do not prohibit resale in the absence of deception. Several other federal cases in which the conduct complained of was similar or identical to that involved in the principal case have been decided on the same principle. See, *e.g., Champion Spark Plug Co. v. Reich,* 121 F.2d 769 (8th Cir. 1941); *Bayer Co. v. Shoyer,* 27 F. Supp. 633 (E.D. Pa. 1939); *Bayer Co. v. Sumner Printing Co.,* 7 F. Supp. 740 (N.D. Ohio 1934); *Guerlain Perfumery Corp. v. Klein,* 57 F.2d 724 (E.D. N.Y. 1932).

In *Bayer Co. v. Shoyer,* the court granted an injunction only after finding that the label used by the defendant tended to deceive the public. The plaintiff in that case produced and sold on the market aspirin tablets under its own well-known label and trade-marks. The defendant purchased bottles of the aspirin manufactured by the plaintiff and rebottled the product into smaller bottles of four tablets to each of which he attached labels of the same color used by the plaintiff. These labels bore the trade name and trade-mark of the plaintiff accompanied by a disclosure that defendant had performed the rebottling independent of the original bottler. The court found deception due to the fact that the words of disclosure were in much smaller print than the words "BAYER ASPIRIN" or "THE BAYER CO," which designate the product of the plaintiff. It was stated by the court that it is proper for a repacker or rebottler to use a manufacturer's trade-mark upon new containers as long as the label discloses the fact of rebottling in a manner sufficient to eliminate any deception upon the consumer. The appellate division in the *Lanvin* case apparently was satisfied that the defendants had sufficiently fulfilled this requirement.

It should be noted that none of the New York or federal cases cited to illustrate the necessity of the element of deception are of recent origin. The scope of practices embraced within the law of unfair competition and trade-mark infringement is constantly being broadened in order to accommodate more realistically an increasingly complex business world. Where once the element of deception or "palming off" was the sole criterion for the granting of equitable relief, the courts have gradually elaborated other theories that may justify equitable intervention even in the absence of any showing of deception. One example is injury through dilution of one's trade-mark occasioned by its use on another's product that may result in a gradual decline of its unique impression upon the public mind. See *Aunt Jemima Mills Co. v. Rigney & Co.,* 247 Fed. 407 (2d Cir. 1917); *Tiffany & Co. v. Tiffany Productions, Inc.,* 147 Misc. 679, 264 N.Y. Supp. 459 (Sup. Ct.), *aff'd,* 237 App. Div. 801, 260 N.Y. Supp. 821 (1932), *aff'd,* 262 N.Y. 482, 188 N.E. 30 (1933).

The principal case announces a doctrine that in the first analysis may seem repugnant to a layman's sense of fairness. The defendants obviously are deriving a benefit from the use of the Lanvin trade name and brand name on the rebottled product. Should Lanvin's right to relief in equity fail solely on the determination that the conduct of the defendants is free from any deception, or may the plaintiff avail itself of some other grounds sufficient to maintain a cause of action in equity? Circumstances not disclosed in the complaint have a bearing upon this question. First, the smaller bottles of toilet water marketed by the defendants are of the type traditionally used in the cosmetics trade as containers of perfume rather than toilet water. If the case had been permitted to go to trial, a finding of this additional fact might have warranted an inference of the required element of deception. Second, perfume could be considered as an unusually delicate substance susceptible to injury in the transfer from one container to another that might destroy the balance and alter the nature of the product. Proof of this premise might sufficiently establish potential injury to Lanvin's goodwill to induce equity to grant relief.

An appeal by Lanvin is now pending in the New York Court of Appeals. It will be interesting to observe whether that court determines the sufficiency of the plaintiff's complaint solely within the narrow confines of section 2354(6) of the Penal Law because of the narrow manner in which the plaintiff conceived his action, or announces a general ruling on the defendants' practice as governed by the laws of unfair competition and trade-mark infringement. Until the court of appeals passes on the question, the appellate division's holding in *Lanvin Parfums, Inc. v. Le Dans, Ltd.* serves to reaffirm prior New York decisions requiring the element of deception before affording protection from such business conduct under section 2354(6).

G. S. M.

LEGISLATION

BANKING—CONFLICTING CLAIMS OF AUTHORITY TO PROPERTY AND CREDITS IN THE HANDS OF INVESTMENT COMPANIES AND BRANCHES OF FOREIGN BANKING CORPORATIONS—*Banking Law, Sections 204(a)(2)(e) and 518(3)—New.*

These two new sections provide that an investment company or a branch office of a foreign banking corporation doing business in this state need not give any effect to a claim of authority to order the payment of any property or funds on its books to the credit of any party if the claim conflicts with a claim of authority of which the investment company or foreign banking corporation had prior notice, unless the person asserting the claim procures from a court of competent juridiction a restraining order, injunction or other appropriate process, or unless the person executes an acceptable bond indemnifying the company for all liability, costs, and expenses incurred in turning over the property pursuant to the claim of authority.

Prior to 1960 banking and investment companies within the state were not required to honor adverse claims against property that they held unless a court order was procured or an indemnification bond given to that particular institution. There were no provisions in the statutes, however, in the situation where there were conflicting claims of authority to the property held by the institution, as opposed to where there were adverse claims. As a result, the banking or investment company assumed the risk of turning over the property in its possession when there were conflicting claims, *e.g.*, when a dissident group of a corporation which had elected its own officers made demands and threats to the institution holding the corporate account, insisting that only that group was entitled to operate the account.

In 1960 the New York legislature amended the Banking Law to protect bank and trust companies, section 134(4), industrial banks, section 310(4), and private bankers, section 171(4), when there were conflicting claims of authority to accounts in their possession. The new sections enacted in 1961 merely expand this protection so that investment companies and branches of foreign banking institutions are now covered. The amendments to the Banking Law are effective immediately.

K. E. N.

INFANTS—CONTRACTS FOR SERVICES—JUDICIAL APPROVAL—*Domestic Relations Law, Sections 74 and 74-a—New.*

Section 74 of the Domestic Relations Law provides for the judicial approval of any contract made or proposed to be made for the employment of any infant in the musical or theatrical field or in professional sports and of any contract for services to an infant in conjunction with such professional work. After such approval, the infant is denied the common law right to disaffirm the contract. This section applies only to contracts made with infants who reside within the state, or to contracts that require the infant's services to be performed within the state.

The petition for such approval may be made either to the supreme court or the surrogate's court by any interested person; however, before the contract may be approved, the written acquiescence by the parent or guardian of the infant must be filed in the proceeding unless the infant is eighteen or emancipated. It must also be shown that no provision of the contract extends for a period of more than three years from the date of approval, whether it be by option or otherwise. The court, upon the acquiescence of the parent or infant, may condition its approval upon the setting aside for the benefit of the minor up to fifty per cent of the net earnings, which are defined as the gross earnings less taxes, reasonable sums for support, care, education, and professional management of the infant, and reasonable fees and expenses paid in connection with the proceeding, the contract and its performance. The judicial approval of the contract may be revoked or modified by the court if it finds that the welfare of the infant is being impaired. Any such change in the contract, however, does not affect any right of action existing at the time of the change unless the court determines that a refusal to perform was justified on the ground of impairment of the well-being of the infant. Any contract that is modified, amended, or assigned after its approval is deemed a new contract and therefore unenforceable unless approved *de novo*.

Section 74(a) provides that no parent or guardian shall be liable either as a party or a guarantor on any contract that the supreme court or the surrogate's court has jurisdiction to approve under section 74 unless the contract is so approved. This section operates to coerce the party contracting for the minor's services to obtain judicial approval of the contract since otherwise the parent, guardian or the infant will not be bound by it.

Before the adoption of the above sections the general rule was that a minor could disaffirm any contract made by him. See *Beardsley v. Hotchkiss,* 96 N.Y. 201 (1884); *Chapin v. Shafer,* 49 N.Y. 407 (1872). Certain exceptions have been engrafted upon the general rule. Section 83 of the Personal Property Law makes a minor liable for the reasonable value of necessaries. *International Text Book Co. v. Connelly,* 206 N.Y. 188, 99 N.E. 722 (1912). Section 260 of the Debtor and Creditor Law denies any infant over eighteen years old who is engaged in business the right to disaffirm a business contract that was reasonable and provident when made. *Sazani v. McNally,* 8 Misc. 2d 526, 167 N.Y.S.2d 646 (1957). Section 281 of the Education Law denies any infant over sixteen years of age the right to disaffirm a contract for a loan or an extension of credit given and used for the pursuit of higher education in a university within the state.

Prior to this enactment it was the general rule that a parent or guardian could become liable on an infant's contract either as a party or guarantor. Under these new sections of the Domestic Relations Law both the minor's right to disaffirm contracts and the parent's ability to become bound on such contracts have been limited. If these contracts for professional services are judicially approved, the infant may not disaffirm them nor can the parent or guardian become liable on them.

These sections shall become effective September 1, 1961.

P. J. D.

PRIVATE CORPORATIONS—*New York Business Corporation Law, Sections 101–1401—New.*

The legislature has enacted sections 101–1401 of the Business Corporation Law to supersede the provisions of the now repealed General Business Law and the Stock Corporation Law. The new Act applies to all domestic corporations organized for profit that are in existence on or after the effective date of the law, April 1, 1963. The Act also applies to every foreign corporation organized for profit that is authorized or does business in the state of New York.

The new law, while drawing the greater part of its substance from the pre-existing Stock Corporation Law and the General Corporation Law, contains many new provisions not found in either of these statutes. The new statute provides for greater flexibility in the handling of the internal affairs of the corporations of this state and for the simplification of some of the procedural requirements of law that existed previously. The new law is intended to foster the incorporation of business in New York.

S. M. K.

YOUTH COURT ACT REPEALED—PROVISIONS OF CODE OF CRIMINAL PROCEDURE, CHILDREN'S COURT ACT, NEW YORK CITY CRIMINAL COURTS ACT, EDUCATION LAW, PENAL LAW, PUBLIC HEALTH LAW, AND THE VILLAGE LAW, ENACTED TO CONFORM TO THE YOUTH COURT ACT—*Repealed.*

The controversial Youth Court Act, which was originally enacted in 1956, N.Y. Sess. Laws 1956, ch. 838, and the effective date of which was deferred at each succeeding legislative session, has been repealed by the New York legislature. N.Y. Sess. Laws 1961, ch. —.

The Youth Court Act was to have established a new court as a division of the county court in every county of the state except New York County, where it was a division of the court of general sessions. The youth court was to have original jurisdiction over youths between the ages of sixteen and twenty-one charged with a crime or with an offense of disorderly conduct, vagrancy, or of being a disorderly person. It was to have retained exclusive jurisdiction over all proceedings leading to the adjudication of a youth as a youthful offender, a wayward minor, or an adolescent drug user.

Under the Act, youths retained at all times prior to trial the right to waive youthful offender treatment and to demand to be dealt with as an adult. Under this alternative they would have been proceeded against as adult defendants; the youthful offender charge would have been dismissed and the appropriate criminal charge would have been substituted. Any youth sixteen or seventeen years of age who had no prior record of felony conviction and was not charged with a crime punishable by death or life imprisonment could be treated as a youthful offender. Such treatment, however, could be denied upon written certification by the court. The Act further provided that youths, sixteen and seventeen years of age, who had a prior record of felony conviction, in the discretion of the court, could be treated as youthful offenders. Eighteen, nineteen, and twenty year-old offenders could also have been treated as youthful offenders provided they had no prior record of a felony conviction.

If a youth were determined to be eligible for youthful offender treatment and gave the necessary consent, he would have been charged with being a youthful offender and would have been required to plead. A plea of guilty or a finding to that effect after summary trial was to have resulted in a decision of being a youthful offender. The youthful offender was then to have received a suspended sentence, a sentence imposed with execution suspended, or commitment. Commitment was to have been to an authorized religious, charitable or public institution for an indefinite period up to three years.

To be adjudicated a youthful offender was not to have been deemed a conviction of crime. However, if a youth were adjudged a youthful offender for the commission of acts, which, if committed by an adult would have been a felony, the judge, in his discretion, could certify this fact on the judgment after either a summary trial or a special hearing held for this purpose. The proceedings were to have been conducted in private and all records were to have been kept confidential except where the youth had been proceeded against on a criminal charge and had requested a public hearing.

The repeal of the Act takes effect immediately.

D. B. C., III

BOOK REVIEWS

PRODUCTS LIABILITY. Volume 1. By Louis Frumer[1] and Melvin I. Friedman.[2] Albany: Matthew Bender & Company. 1960. Pp. xvi, 750. $45.00 [for two-volume treatise].

This book, which is the first of a two-volume set, will probably be better received by plaintiffs' attorneys than by lawyers who devote their energies to representing defendants in products liability cases. One begins to surmise that such will be the case upon reading the first sentence of the text: "Today's law of products liability mirrors the complex, highly industrialized, Madison Avenue, 24-inch screen, 'hard sell,' atomic age of the expert in which we live." [3] A further examination indicates that the authors are sympathetic to the "modern law" of products liability and the present trend toward more extensive liability for those who make or distribute goods. This conclusion is not intended as a criticism of the book, for the authors are in good company,[4] but it forms the basis for a prediction that defendants' lawyers will cite it less often than their opponents.

It is relatively easy to describe the scope of the book under review. It is a treatise on the law that governs actions brought to recover damages caused by defective goods. Somewhat more difficult is the problem of delineating the legal principles that are being applied by the courts in such cases. The term "products liability law" has definitely gained a place in the present-day legal vocabulary, but it is still more a description of a group of cases typed by their factual situations than a definition of a particular body of law. Lawyers and courts continue to categorize such cases in accord with whether the action is based upon warranty, negligence, deceit, or statutory negligence. However, the law in this field is becoming more and more of a true hybrid since concepts born of contract cases are not only being confused with, but also cross-bred with, principles and doctrines originally thought applicable only to tort actions.

The outline adopted by the authors suggests, with apparent approval, this decreasing emphasis on the distinctions between the various theories of liability in this area. Material is not subsumed under the heading "warranty" or "negligence," but rather it is divided in accordance with whether the retailer, middleman or manufacturer is the defendant, or, in other cases, by the type of product involved.

After an introductory chapter in which the authors use *MacPherson v. Buick* [5] and *Henningson v. Bloomfield Motors, Inc.*[6] as examples of what they call the "expanding nature of products liability," [7] the next three chapters are devoted to the legal responsibility of manufacturers. Chapter two, which comprises nearly half of the first volume, discusses the liability of a manufacturer in negligence. The authors have included that which one would expect to find in such a chapter; *i.e.*, duty, causation, res ipsa loquitur, contributory negligence and assumption of risk. Although the author's predilection for the plaintiff's position sometimes detracts from their analysis of the cases, the textual treatment of these topics is certainly adequate if not exceptional.

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[1] Editor, *Personal Injury Newsletter.*

[2] Associate Editor, *Personal Injury Newsletter.*

[3] P. 1.

[4] See, *e.g.*, James, *Products Liability*, 34 TEX. L. REV. 192 (1955).

[5] 217 N.Y. 382, 111 N.E. 1050 (1916).

[6] 32 N.J. 358, 161 A.2d 69 (1960).

[7] § 1.

More striking than the expected topics, however, is the non-legal material that is contained here and elsewhere throughout the volume. There is an article [8] on sampling for legal cases written by a statistician and research director; a subchapter [9] done by a metallurgist that begins with an explanation of why the de Havillant Comet jet airliners were crashing in 1954 and proceeds to give the reader an introduction to laboratory methods of investigating metallurgical failures; and still a third section [10] is included, written by a dean and a professor at an engineering school, which ranges from a discussion of the engineer's creed of ethics to safety codes and testing.

Although the materials included on scientific topics is definitely introductory in nature, the authors' concept of "melding the skills of the lawyer and engineer" [11] is undoubtedly the most important contribution that this practitioners' treatise offers. Products liability cases turn, in an overwhelming number of instances, solely upon the facts, the most important of which often can be proved only through the use of scientific methods and the testimony of engineers and technical experts. If the authors had done no more than to emphasize that a plaintiff must prove by competent evidence that the product allegedly causing the injury was defective, this would have been valuable. Actually, through careful selection of material, they have accomplished more. In addition to introducing the reader to some basic elements of various scientific fields, the frequent references to more detailed technical texts provide the lawyer unfamiliar with scientific bibliography a means for more extensive study of particular problems.

The third chapter discusses a manufacturer's liability in warranty. Here this reviewer found some difficulty with the authors' arrangement. Since the warranty cause of action is first introduced at this point, one might well expect an exhaustive treatment of it in this chapter. However, the only problem given complete coverage is that arising from the requirement of privity. Other warranty topics are distributed between this and a later chapter devoted to a retailer's liability,[12] with the latter containing somewhat more of the material. It is not surprising that the authors found it more convenient to discuss warranty questions under the section on retailers, since the privity requirement has caused most of the law relating to this subject to be made in cases involving the plaintiff and the immediate vendor. However, the frequent references to the later chapter may well prove disconcerting to some readers.

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[8] § 6.02.

[9] § 6.03.

[10] § 7.03.

[11] P. iii.

[12] Chapter 5.

Completing the discussion of the manufacturer's liability is a short chapter on deceit. This is followed by chapter five entitled "Retailer's Liability." Herein discussed are numerous miscellaneous problems particularly related to suits against an immediate vendor, but the bulk of the chapter is devoted to a thorough treatment of the "frontier of products liability" [13] —warranty. As elsewhere, there is some evidence of the authors' preference for judicial decisions favoring plaintiffs, but much of the warranty material should be equally encouraging to those being sued. Advocates of a complete abolition of the privity requirement will find support here as in the third chapter; on the other hand, care is taken to emphasize the many facets of the plaintiff's burden of proof and the defenses available to a defendant. The book is especially competent here, and the consideration given to such problems as the necessity that there be a *breach* of some *warranty,* the difficulty of proving causation between the alleged breach and the damages, the availability of a defense akin to contributory negligence, and the requirement of reliance in at least some warranty actions, well supports the authors' position [14] that although warranty liability is strict, it does not make the seller of goods a virtual insurer.[15]

Following chapter five is a seven-page chapter on the liability of wholesalers, distributors and jobbers. The first volume ends with a long chapter on questions peculiar to cases involving foods and beverages. This commences with a twenty-page discussion of background material on the medico-legal aspects of food poisoning by Dr. Paul D. Cantor who is on the faculty of both the law and medical centers of Georgetown University. Following this are sections devoted to particular problems, arranged in the traditional negligence-warranty dichotomy and subdivided into sections devoted independently to manufacturers' and retailers' liability. A discussion is then included on the legal responsibility of restaurateurs, and the chapter closes with a long section devoted to exploding-bottle cases.

Although the second volume will not be published until this summer, a table of contents indicates what it will contain. Besides a table of cases by product, a bibliography and index, it promises chapters on allergies and peculiar susceptibility, drugs and druggists, inflammable substances, conflict of laws, statutes of limitation, derivative actions, death actions, indemnity, pleading and practice, special applications of discovery techniques, demonstrative evidence and products liability insurance.

Several general comments remain to be made. The style of writing might be described as "breezy" in comparison with most legal works. It is easy to read and lucid. The loose-leaf format of the treatise, typical of many works by this publisher, should prove advantageous if the frequency of reported cases in this area continues at its present rate. The volume is well documented and, in keeping with the more modern practice, most cases cited are accompanied by brief parenthetical comments indicating their distinguishing characteristics. Finally, the familiarity of the authors with the latest developments and decisions in this field is clearly demonstrated by the many recent cases that have been included.

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[13] P. 5.

[14] P. 382.

[15] See Comment, *A Limitation on Caveat Venditor,* 25 ALBANY L. REV. 67 (1960).

There are several factors that make an evaluation of this treatise difficult. In the first place, it is not the type of book that is designed to be read, contemplated and then put aside. Its purpose is to assist practicing lawyers in finding answers to problems involving products liability law. Unless it is used for this purpose over a period of time, only an educated guess can be made as to its effectiveness. Second, the book is aimed at the practitioner, not the professor. Although the gulf between the two is undoubtedly not as wide as some seem to believe, they probably do tend to look at publications in a different light. Finally, and this is the most serious difficulty, the index will be included in volume two. Because of the nature of the subject matter of products liability law, a good index and a useful table of cases are essential. Until they are published, the caveat must be given that the value of the book will depend to a large extent on the success of the authors in making it easy to find that for which one is looking. In spite of these difficulties, however, this reviewer believes that the work is the first successful effort to provide the attorney with a treatise that will assist him in handling cases in this field.

FREDERICK M. HART *

SUPREME COURT OF JUDICATURE OF THE PROVINCE OF NEW YORK 1691–1704. By Paul M. Hamlin[1] and Charles E. Baker.[2] New York: The New-York Historical Society. 1959. 3 vols. Pp. 438, 386, 562. $75.00.

The Selden Society of England and the Stair Society of Scotland have tried to preserve the treasures of our heritage of the common law by means of their scholarly publications. Except for the American Society of Legal History organized in 1956, we have in the United States no comparable organizations dedicated to the publication of our American legal history. General historical societies, state and local, have tried to collect and preserve important historical documents and records, both legal and nonlegal. Notable among these is the New-York Historical Society.

The cause of legal history is indebted to the Society and to the co-authors of the *Supreme Court of Judicature of the Province of New York 1691–1704,* Dr. Paul M. Hamlin and Charles E. Baker. Dr. Hamlin, author of *Legal Education in Colonial New York,* is a trained legal historian who conceived this study, spent years of relentless research on the basic source materials, and gave direction and focus to the work before the Society became financially and actively interested in the project. Charles E. Baker, editor of the Society, is also a recognized student of legal history.

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The Supreme Court of Judicature, the highest law court of the province and state of New York, is a judicial tribunal that has continued in unbroken operation since its establishment in 1691. As the authors quote in their preface:

> So wise were the provisions of that early act of 1691, that the patriotic framers of the first State government recognized its creature, the Supreme Court of the Province, as an appropriate tribunal for a free people and a new order of things; . . . always in the history of this State, it will be still the link which connected the judicial system of New York and the very dawn of English law. (Fowler, *N. Y. SCJ Organization,* 489, 492, 211.)

In judging the merits of any legal treatise it is necessary to understand the scope of the publication. This is best indicated by the chapter headings. In volume one, we find "Superior Judicial Tribunals, 1665–1691," "Establishment of the Supreme Court of Judicature," "Personnel of the Bench," "Counsellors and Attorneys," "Administrative and Other Officers of the Court," "The Jury System," "Oaths," "Fees and Costs," and "The Court in Operation." Volume two contains chapters entitled "Minutes of the Supreme Court of Judicature," "Notes to Supreme Court of Judicature Minutes," and "Appendix: Rules of Procedure, 1699–1764," as culled from the minutes by a society of New York lawyers called "the Moot" during the early 1770's. The minutes are important to both legal and non-legal historians. They shed light on many important legal trials: the prosecution of Leisler for treason; *Lyndall v. Schuyler,* involving a New York City monopoly of the processing of flour for export; the Bayard treason trial; and many other trials showing how the court operated, the political strife of the times, and the quality of justice rendered during the evolution of this court. The notes to the minutes identify the litigants, explain the actions involved and give the background and history of the cases for which collateral material could be found. Volume three contains an important biographical dictionary of the bench and bar of the court, a glossary of abbreviations, a key to sources cited, a cross-index from defendants to plaintiffs, an index of persons and places, and a comprehensive subject index to the three volumes.

The foreword by the late Alison Reppy, Dean of the New York Law School, and the preface by the two authors add a valuable feature to the study. Dean Reppy's seventeen-page commentary is a scholarly analysis of the scope and historical significance of the project. The authors' preface will give the reader a rewarding experience. It reveals how the source materials on which the work is based were assembled, where they are located and how parts of it were discovered buried among the musty archives in the Court of Appeals Hall in Albany.

The subject index will be valuable not only to scholars of legal history but also for social, political and local historians. References to non-juridical material are listed under such key-topics as: Churches, Indians, Manors, Negroes, Pirates, Slaves, Taverns, and Women. The cases considered and discussed in these volumes involved not only such crimes as treason, sedition, murder, libel, trespass, but also cases that reveal many aspects of the ordinary life of the times, *e.g.*, marriage, monopolies, religion, land titles, and slavery. The court dealt with a cross-section of humanity—bakers, bricklayers, physicians, servants and, of course, politicians. The treatise is truly a fertile field for the legal, social and political historian.

The authors in their preface emphasize:

> Neither author conceives the present work to be the final word on the subjects. . . . It was . . . not their intention to write a definitive work—rather to reveal to future investigators a body of important material in a field heretofore scarcely investigated.

However, there is no denying that this work will take high rank with previous published volumes on various aspects of legal history, *e.g.*, Holdsworth's *History of English Law*, Bigelow's *History of Anglo-Saxon Procedure*, Ames's *Lectures on Legal History*, Goebel & Naughton's *Law Enforcement in Colonial New York*, Howe's *Readings in American Legal History* and Hamlin's *Legal Education in Colonial New York*, to cite only a few. Although the authors make only modest claims for their study, it could not have been done without much industrious research, editorial skill and discriminating judgment. It is hoped that other legal historians will follow their example and lay the foundation stones for the complete story—a history of American law.

This edition is printed on rag paper, bound in buckram, gold-stamped and is limited to 300 copies.

ERNEST H. BREUER *

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* Law Librarian, New York State Library.

DIGESTS OF CURRENT DECISIONS

ADMINISTRATIVE LAW

Plaintiff, a New York State corporation, operates retail supermarkets in New York and other states. Defendant Board of Pharmacy appealed from a judgment that permitted plaintiff to sell Bayer Aspirin tablets in retail stores without such stores being registered as pharmacies and without having registered and licensed pharmacists supervise such sales. See Education Law § 6805. Plaintiff contended that article 137 of the Education Law, which regulates the sale and distribution of drugs, did not apply to plaintiff because of the express exemption of "proprietary medicines" found in section 6812(2) of the Education Law. Plaintiff further contended that the requirements of section 6805 are arbitrary and deny plaintiff the equal protection of the laws. *Held:* Judgment reversed. In view of the general plan of article 137, which contemplates comprehensive control over all drugs, one cannot establish a drug as a "proprietary medicine" in the absence of a showing that it is "so distinctively or exclusively attributable to its producer as to be regarded as specially the maker's own kind of medicine." The court further held that restricting the sale of Bayer Aspirin tablets, even though they may be harmless, to registered pharmacies is a valid exercise of the state's police power, being neither arbitrary nor unreasonable. *Loblaw, Inc. v. New York State Bd. of Pharmacy,* 12 App. Div. 2d 180, 210 N.Y.S.2d 709 (4th Dep't, January, 1961).

CHATTEL MORTGAGES

The owner of certain chattels mortgaged them to the First National City Bank of New York, but the mortgage was not properly filed. He then gave a second mortgage on this property to Bloom who took with notice of the first mortgage. Bloom filed his mortgage properly. Later, the mortgagor made an assignment for the benefit of creditors. Since the bank did not comply with the provisions of the Lien Law for the filing of chattel mortgages, the first mortgage was invalidated as against the assignee for the benefit of creditors as provided in section 17 of the Debtor and Creditor Law. But the second mortgage, which was subordinate to the bank's lien because Bloom took with notice of that lien, was superior to the rights of the assignee since it was filed properly prior to the assignment. Thus, the issue presented was whether the second mortgage should be elevated to first priority because of the invalidation of the first mortgage as to the assignee, or whether the assignee should succeed to the rights of the first mortgagee and thus have priority over the second mortgagee. *Held:* The assignee succeeds to the rights of the senior mortgagee over the junior mortgagee. The court reached its conclusion by construing section 230 of the Lien Law to mean that only those parties, as against whom the lien is stated in the statutes to be void, should benefit from the improper filing of a chattel mortgage. To elevate the second mortgagee to first priority would be to bestow on him an unearned windfall. *Matter of Edward Bibinger, Inc.,* 12 App. Div. 2d 237, 210 N.Y.S. 2d 319 (2d Dep't, January, 1961).

CIVIL RIGHTS

Petitioners, Negro citizens of Tuskegee, Alabama, challenged the validity of a state act redefining the boundaries of Tuskegee on the ground that the statute violated the due process and equal protection clauses of the fourteenth amendment, as well as the right to vote as guaranteed by the fifteenth amendment. Petitioners alleged that the act, which altered the shape of the city from a square to a twenty-eight-sided figure, had the effect of removing from the city the majority of Negro voters, while not removing a single white voter or resident. The district court's action in dismissing the case for failure to state a cause of action was affirmed in the court of appeals for the Fifth Circuit. The United States Supreme Court granted certiorari. *Held:* The district court erred in dismissing the complaint. Although a state has plenary power in redistricting and redefining local boundaries, it cannot exercise that power where the effect is to deprive Negroes of their right to vote because of their race, contrary to the fifteenth amendment. The opposite conclusion "would sanction the achievement by a State of any impairment of voting rights whatsoever so long as it was cloked in the garb of the realignment of political subdivisions." *Gomillion v. Lightfoot,* 364 U.S. 339 (November, 1960).

CONFIDENTIAL COMMUNICATIONS

In an action to recover damages for alleged brain injuries resulting from an automobile accident, the plaintiff was unwilling to permit inspection by defendants of the hospital records or pretrial examinations of the doctors who treated her. The plaintiff insisted that by virtue of the provisions of sections 352 and 354 of the Civil Practice Act she had the right to try the action without disclosing the information that the defendants sought. The sections prohibit a physician from disclosing any information that he has acquired in attending a patient unless it is expressly waived on the trial by the patient. *Held:* Plaintiff could insist that such information be withheld until the nature and extent of her injuries were revealed on the trial. However, the sections do not give plaintiff the right to force defendants to trial or to require the court to try the action so long as plaintiff would not permit pretrial inquiry with respect to the injuries for which she sought damages. The court, pursuant to section 85 of the Judiciary Law, has adopted a special statement of readiness rule that no personal injury action involving hospitalization should be placed on any trial calendar unless a written instrument was given to the defendant's attorney furnishing him with the entire record. This rule leaves the statutory privilege against further discolsure unimpaired. It neither compels a patient who has already revealed the nature of his injuries to waive the right of privacy nor compels disclosure of additional confidential information without a waiver in the specified mode. The plaintiff in a personal injury action must necessarily disclose the nature and extent of his injuries and cannot proceed to trial without waiving the statutory privileges. *Kriger v. Holland Furnace Co.,* 12 App. Div. 2d 44, 208 N.Y.S.2d 285 (2d Dept, December, 1960).

CONSTITUTIONAL LAW

Actions in both state and federal courts were brought by school teachers who challenged the constitutionality of an Arkansas statute requiring teachers in public schools to file affidavits giving the names and addresses of all organizations to which they had belonged or had contributed within the preceding five years. The teachers, who had been hired on a year to year basis, contended that the statute, which made the affidavit a prerequisite to employment, violated the due process clause of the fourteenth amendment in that it deprived them of their associational and academic freedom. *Held:* Notwithstanding the fact that the state has a valid interest in protecting public education and that it can inquire into and set qualifying standards for its teaching personnel, it nevertheless cannot attain that end through the implementation of a statute that so broadly stifles fundamental personal liberties. *Shelton v. Tucker,* 364 U.S. 479 (December, 1960).

CONSTITUTIONAL LAW

Petitioner was served with a subpoena of the House of Representatives ordering him to produce certain records of the Civil Rights Congress. Relying on his privilege against self-incrimination under the fifth amendment, petitioner refused to produce such records. Subsequently, petitioner was convicted for wilfully failing to comply with the subpoena. *Held:* Conviction affirmed. The evidence showing that the subcommittee of the House Committee on Un-American Activities had a reasonable basis for believing that petitioner could produce the records in question, coupled with his complete failure to suggest a reason for his inability to produce them, estabilshed a prima facie case of wilful failure to comply with the subpoena. The fifth amendment does not excuse a witness from producing records since it is settled that records held in a representative capacity rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination. *McPhaul v. United States,* 364 U.S. 372 (November, 1960).

CORAM NOBIS

Plaintiff appealed from a unanimous order of the appellate division granting defendant's motion for a writ of error coram nobis. The defendant, who was unable to speak English, was convicted of robbery in the first degree fourteen months prior to the application for coram nobis. He was represented on the trial by counsel of his own choosing and by an official Spanish interpreter. Defendant predicated his right to the writ on the following grounds: (1) that his counsel falsely informed the court that he had advised the defendant of the seriousness of the charge; (2) that he was denied the right to counsel because of the latter's inability to speak and understand the Spanish language; (3) that the interpreter failed to translate to him the questions that the judge propounded to his counsel and counsel's answers thereto. *Held:* Since the falsification was in no way attributable to the state there was no denial of due process. The defendant had the privilege of retaining his own counsel and having availed himself of that right cannot be heard to complain. *People v. Hernandez,* 8 N.Y.2d 345, 170 N.E.2d 673, 207 N.Y.S.2d 668 (November, 1960).

CRIMINAL LAW

Defendant was charged with operating an unregistered motor vehicle in New York in violation of section 319 of the New York Vehicle and Traffic Law. Section 319 requires the operator of a motor vehicle registered in New York or of any unregistered motor vehicle to have insurance. Defendant's automobile was registered in a foreign state. *Held:* It is not a criminal offense to operate a motor vehicle registered in a foreign state, on the public highways of New York without having insurance. Defendant's vehicle fits neither category of the statute. It is neither a motor vehicle registered in New York nor an unregistered motor vehicle. *People v. Jenning,* 25 Misc. 2d 1, 206 N.Y.S.2d 477 (Police Ct., Rockland County, October, 1960).

DOMESTIC RELATIONS

The parties separated in 1958, and in 1959 a separation agreement was executed. The action instituted by the wife was predicated upon two causes of action. The first sought to avoid the agreement as a violation of section 51 of the Domestic Relations Law, which prohibits a contract to alter or dissolve a marriage or to relieve the husband from his support obligation. The second alleged that two paragraphs violated section 51 and vitiated the entire agreement. The substance of the agreement was contained in the two paragraphs that provided (1) that the wife might institute divorce proceedings and the husband would appear and execute all necessary papers; (2) that if no such proceedings were commenced within one year, the husband might sue for divorce and the wife would appear and execute all necessary papers; and (3) that the separation agreement was absolute, unconditional and irrevocable, and survived any divorce decree. The plaintiff appealed from a dismissal of the second cause of action at special term. *Held:* Affirmed without prejudice. The paragraphs did not violate section 51 because the separation agreement was not contingent or conditioned upon the obtaining of a divorce. It was, therefore, not in contemplation of divorce and against public policy; rather, the terms of the agreement survived any divorce suit. Separation agreeements may provide for divorce if the benefits do not induce the procuring of a divorce decree. The allegation that the public policy of New York was violated by the insufficiency of the support provisions was untenable. There was no contention that the husband was absolved of his obligation or that the provisions were made to procure the divorce. If there was any fraud on the part of the husband affecting the adequacy of support, the plaintiff can raise this point upon the trial of the first cause of action. Section 51 prohibits only those contracts relieving a husband from his responsibility and does not apply to contracts definitely and unalterably fixing the support obligation. *Kepner v. Kepner,* 12 App. Div. 2d 204, 209 N.Y.S.2d 681 (3d Dep't, January, 1961).

DOMESTIC RELATIONS

In 1955 defendant, at the age of nineteen years, was married by a justice of the peace. Subsequently, defendant, whose previous marriage had never been dissolved, was indicted for bigamy. The county judge granted a motion to dismiss the indictment, holding defendant's second marriage void on the grounds (1) that defendant was then nineteen years old, and (2) that under section 11(5) of the Domestic Relations Law a justice of the peace is without authority to perform a marriage where one of the parties thereto is under the age of twenty-one. *Held:* Order reversed. Section 11(5) of the Domestic Relations Law, which provides that where either party is under twenty-one years of age a marriage shall be solemnized only by those authorized in section 11(1), is only directory. It does not invalidate the marriage of a person under the age of twenty-one by a justice of the peace who is authorized to solemnize marriage only by section 11(3). A justice of the peace has the authority to solemnize marriage generally, and the statute contains no provision that makes void a marriage of persons under the age of twenty-one if not solemnized by the specified officials. *People v. Heine,* 12 App. Div. 2d 36, 208 N.Y.S.2d 188 (2d Dep't, December, 1960).

INSURANCE

Defendant applied for insurance under the New York automobile assigned risk plan and was assigned to plaintiff insurance company. Although defendant had been convicted twice for disorderly conduct and twice for public intoxication and was therefore ineligible for insurance under the plan, he stated in his application that he had not been involved in any non-vehicular offenses. A routine investigation by the insurance company at the time of application failed to disclose the prior convictions. The convictions were discovered as the result of a subsequent investigation of an accident in which defendant was involved. The plaintiff then notified the defendant that it had elected to treat the policy as void since it had been obtained on the basis of fraudulent misrepresentations. *Held:* Although the insurer had the right to cancel the policy, it did not have the right to treat it as void from its inception. The assigned risk plan is a comprehensive scheme of regulations governing all the rights and liabilities of parties entering into assigned risk contracts. The assigned risk plan, which provides only for prospective cancellation, abrogates an insurer's common law right to rescind on the ground that the policy had been obtained through fraud or misrepresentation. An insurer is limited to the right to cancel on ten days' notice as specified in the plan. *Aetna Cas. & Sur. Co. v. O'Connor,* 8 N.Y.2d 359, 170 N.E.2d 681, 207 N.Y.S.2d 679 (November, 1960).

MUNICIPAL CORPORATIONS

Plaintiff town obtained an injunction restraining the defendants from continuing their business of sand mining and excavating in a populated residential area by virtue of a town ordinance regulating such mining activities. The ordinance, in the interests of public safety, required mining concerns to establish safeguards for the public, such as barricades, setbacks, lights, fences and retaining walls, before excavating. The injunction required defendants to correct certain conditions violative of the said ordinances and to obtain a permit from plaintiff before resuming operations. In the court of appeals, following an affirmance of the judgment by the appellate division, defendants contended that the ordinance was an invalid exercise of the police power and that it violated their vested rights in an established conforming use. Defendants relied upon a 1956 supreme court judgment (which was not appealed) denying the town injunctive relief for the defendants' alleged infractions of a similar, but less restrictive ordinance. *Held:* The defendants' proof failed to overcome the presumption of constitutionality and to establish the unreasonableness of the regulations. The minimal safety standards prescribed by the ordinance constitute a proper method of protecting the public against the known risks associated with uncontrolled excavations. The dissenting opinion maintained that the ordinance represented an attempt to drive the defendants out of business under the guise of regulation. *Town of Hempstead v. Goldblatt,* 9 N.Y.2d 101, 172 N.E.2d 571, 211 N.Y.S.2d 185 (January, 1961).

NEGLIGENCE

Plaintiff and her father recovered damages for personal injuries sustained as the result of the infant's fall while skating on defendant's roller skating rink after 7 P.M. Plaintiff, then thirteen years old, was not accompanied by an adult. The appellate court found that plaintiff failed to establish any common law negligence and that recovery could only be sustained on the theory that a violation of sections 484(1) and 484-a of the Penal Law constitute negligence per se. Section 484(1) makes it a misdemeanor to permit the presence of a child under 16 years of age unaccompanied by an adult in certain public places, including a skating rink. Section 484-a makes it a misdemeanor to permit the presence of children under 14 years of age at a skating rink unaccompanied by an adult after 6 P.M. unless a qualified matron is in attendance. A matron was not in attendance at the time of the accident. *Held:* A violation of section 484-a is not negligence per se. Physical injury is not within the contemplation of the statute; the plaintiff must prove negligence and proximate cause as in the ordinary negligence case. The court concluded that the statute was designed to protect the morals of children, as emphasized by the express exemption of certain forms of entertainment when sponsored by a "school, church or educational religious institution, not operated for profit." *Pelkey v. Brennan,* 12 App. Div. 2d 215, 209 N.Y.S.2d 691 (3d Dep't, January, 1961).

NEGLIGENCE

Plaintiff, an inmate of a federal penal institution, was injured while in confinement. The defendant, the prison warden, was charged with negligence for permitting the building in which plaintiff was injured to fall into a state of disrepair. Plaintiff further asserted that the defendant was negligent in failing to provide proper medical treatment and in transporting plaintiff to another institution while plaintiff was in no condition to travel. *Held:* The warden was immune from an action for negligence based on omissions occurring within the scope of his duties as a governmental official. Such actions, if allowed, would be prejudicial to the proper maintenance of discipline and control. Motion to dismiss was properly granted. *Golub v. Krimsky,* 185 F. Supp. 783 (S.D. N.Y. August, 1960).

RES JUDICATA

Plaintiff insurance company issued a liability policy on an automobile owned by defendant's father. While operating the automobile with the consent, but in the absence of his father, defendant was involved in a collision in which his wife, a passenger in the vehicle, was injured. The injured wife recovered a judgment for damages against defendant's father. The insurer undertook the defense of the defendant's father in that action. The jury found that the defendant had negligently operated the automobile, and the father was held liable under section 59 of the Vehicle and Traffic Law because of his ownership of the vehicle. The plaintiff insurance company paid the judgment. In the present action the plaintiff insurer, as subrogee of the defendant's father, sued defendant to recover the amount paid to his wife. Plaintiff, alleging that the defendant was vouched into the principal action by virtue of certain alleged notices given the defendant by it during the pendency of the first action, moved for summary judgment. The motion was denied by the appellate division, third department. *Held:* Affirmed. The finding in the first action as to the negligent operation of the vehicle by defendant is not res judicata to this action. The defendant was not vouched into the first action by the unsuccessful attempt to implead him. A person, not yet a party to an action, must by proper notice be offered control of the defense of an action before he can be bound by the judgment. The status of the insurer at the institution of the first action was merely that of a potential subrogee whose rights had not yet matured. If the process of impleader is reserved to the actual defendant in an action so that his insurer cannot share in that right, the same rule must apply to "vouching in," the common law counterpart of statutory impleader. *Glens Falls Ins. Co. v. Wood,* 8 N.Y.2d 409, 171 N.E.2d 321, 208 N.Y.S.2d 978 (November, 1960).

SERVICE OF PROCESS

Service of process on a non-resident motorist was attempted pursuant to section 52 of the New York Vehicle and Traffic Law. Proper notice was delivered to the secretary of state, and a notice of such service, together with a copy of the summons and complaint was sent to the defendant by registered mail. The letter was returned marked "Moved, Left No Address." The defendant, who had no actual knowledge of the service of process, appeared specially and moved that service be quashed. *Held:* Motion granted. The non-resident motor vehicle statute requires that actual notice be given to a defendant. Since the statutory requirements had not been complied with, the service of process was insufficient. It would appear to be a denial of due process under the federal constitution to hold that notice is not necessary. *Kohler v. Derderian,* 187 F. Supp. 173 (S.D. N.Y. September, 1960).

TRUSTS

Testator provided that upon the death of the last life income beneficiary and in default of lineal descendants, the remainder of a residuary trust should go to the St. Thomas Church in New York City for the purpose of erecting and maintaining in such place as the church may select, a building or buildings to be called the Scott Memorial Home for the care of persons suffering from tuberculosis. The church stated that it had become impracticable and impossible to use the principal of the residuary trust as provided. The surrogate changed the testator's direction by substituting the care of persons suffering from "respiratory and thoracic diseases" in the place of those suffering from tuberculosis. He directed the use of the money in a manner not designed to benefit the church and without memorializing the Scott family except by describing the assets as the Scott Memorial Fund. *Held:* As a matter of law the surrogate exceeded his powers by overriding or failing to give effect to the basic purposes of the testator as expressed in the instrument. The circumstances call for the *cy pres* rule, but section 12 of the Personal Property Law and section 113 of the Real Property Law require that the direction made shall be such as will most effectually accomplish the general purpose of the testament, where due to the change in circumstances a literal compliance has become impracticable or impossible. Here, the testator was actuated by three dominant considerations: (1) that his name and the name of his family should be included with a building erected and maintained for the benefit of mankind; (2) that this building should be erected and maintained by the church; and (3) that people afflicted with tuberculosis should be aided in their struggle for life and health. The determination of the surrogate did not satisfy these conditions. *Matter of Scott,* 8 N.Y.2d 419, 171 N.E.2d 326, 208 N.Y.S.2d 984 (December, 1960).

WATER POLLUTION

Cayadutta Creek had been classified by the Water Control Pollution Board to permit the creek to be used for the disposal of sewage and waste as long as a public nuisance, as defined by section 1530(1) of the Penal Law, was not created. Thereafter, an order of the Board directed the city of Johnstown to discontinue the discharge of untreated sewage into Cayadutta Creek and further directed the construction of an adequate disposal system. Petitioner denied the Board's power to classify the creek on the grounds that it was a non-navigable stream, title to which was in the riparian owners. Petitioner further asserted that the power to classify was limited to "waters of the state" and that the classification was an unconstitutional interference with a "property right" of the city. *Held:* Where a public nuisance exists, the interest of the state in the public health and safety overrides the city's property right. Section 1208(1) of the Public Health Law provides that "waters of the state" include all fresh water in streams, public or private. *City of Johnstown v. Water Pollution Control Bd.,* 12 App. Div. 2d 218, 209 N.Y.S.2d 982 (3d Dep't, January, 1961).

WILLS

Decedent provided in his will that his wife was to have the use and enjoyment of his residence for her natural life, and at the death of the wife the property was to go to his three sons. The will further provided for the establishment of a trust. The wife was to receive the income for life and at her death the corpus was to be divided in stated proportions between two of his sons. A clause in the will provided: "In the event that any of my said sons should die leaving descendants, said descendants shall take the share of any such deceased son, per stirpes and not per capita." Although the three sons survived the testator, one of the sons died prior to the death of the life tenant and was survived by a widow and three children. The son bequeathed his entire estate to his widow. The problem presented to the court was whether the remainder interest of the son indefeasibly vested at the death of the testator so that it would pass to his wife, or whether the remainder interest was vested subject to being divested by not surviving the life tenant so that the property would go to the descendants of the remainderman as a substitutional gift under the will of the testator. *Held:* The words of the will were not mere surplusage but created a vested remainder, subject to being divested by failing to survive the life tenant, with a substitutionary gift to the descendants of the remainderman. The testator intended that the bulk of the estate be enjoyed by the testator's direct descendants, and thus provided for substitutionary gifts in the event his sons failed to be living at the time of distribution. Words of survivorship refer to the time of testator's death only in the case of an absolute bequest or devise to one, and in the event of his death, to another. Such words carry no such implication where, as in this case, the first devisee or legatee takes a life estate. Heirs of the blood should be preferred to strangers and the presumption prevails in favor of descendants as against collaterals. *Matter of Larkin,* 9 N.Y.2d 88, 172 N.E.2d 555, 211 N.Y.S.2d 175 (January, 1961).

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